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IN THE

Supreme Court of the United States

October Term, 1969

No._____

HENAULT MINING COMPANY,

Petitioner,

vs.

HAROLD TYSK, individually and as Montana State director of the Bureau of Land Management, and STEWART L. UDALL, individually and as Secretary of the Interior,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Henault Mining Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in the above entitled case.

OPINIONS BELOW

The decision of the hearing examiner (App., *infra*, pp. 1-24) is dated July 10, 1964. The decision of the Office of Appeals and Hearings of the United States Department of Interior (App., *infra*, pp. 25-35) reversing that of the hearing

examiner is dated August 12, 1965 and reported at A-30540. The decision of the Secretary of Interior (App., *infra*, pp. 36-54) affirming the reversal of the hearing examiner is dated June 15, 1966, and reported at 71 I.D. 184. The opinion of the United States District Court for the District of Montana (App., *infra*, pp. 55-71) in review of the Secretary's decision is dated July 24, 1967, and reported at 271 F. Supp. 474. The opinion of the United States Ninth Circuit Court of Appeals (App., *infra*, pp. 75-80) dated November 14, 1969, reversing the decision of the lower district court is not yet reported. The subsequent opinion of the United States Ninth Circuit Court of Appeals (App., *infra*, pp. 82-84) denying Petitioner's petition for rehearing in banc, but modifying the Court's previous decision, is dated January 23, 1970, but is not yet reported.

JURISDICTION

The judgment of the United States Ninth Circuit Court of Appeals (App., *infra*, p. 81) was entered on November 14, 1969. A timely petition for rehearing was denied on January 23, 1970 (App., *infra*, p. 85). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Are the actions and rulings of the Department of Interior in its determination of the validity of mining locations under 30 U.S.C. 23 in:

1. denying the use of established and recognized geological data and the valid inferences that are drawn therefrom as a "circumstance" that justifies further expenditures by a prudent man with a

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reasonable prospect of success in developing a valuable mine;

2. requiring that a locator of a valid mining claim under 30 U.S.C. 23 must first complete the exploration recommended for reaching and exposing the profitable ore body that is predicted, with reasonable geological certainty, to exist at mineable depth; and

3. rejecting and suppressing evidence of the locator's good faith and other evidence that tends to reflect upon Departmental abuse of its charge to administer the public land laws in the national interest

in accordance with the law applicable thereto?

STATUTES INVOLVED

The Act of May 10, 1872, Chapter 152, Section 2, 17 Stat. 91, 30 U.S.C. 23, provides:

"Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, located prior to May 10, 1872, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the 10th day of May, 1872, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall

extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th day of May, 1872 render such limitation necessary. The end lines of each claim shall be parallel to each other."

STATEMENT

This case arises out of a Department of Interior initiated contest against a group of eighteen lode mining claims located in an established gold mining district which has been for many years, and still is, the major source of this nation's supply of raw gold. This mining district is situated in the Black Hills of South Dakota, which are an upthrust of the Rocky Mountain system. The ground upon which the claims are located is mineral in character and not within a National forest.

In 1960 the Montana State Director of the Bureau of Land Management for the United States Department of Interior, acting under the authority of the Multiple Surface Uses Act of 1955, 30 U.S.C. s.s. 612-613, instituted an in rem proceeding provided therefore against a designated area in this mining district for the expressed purpose of establishing his right to control and supervise the vegetative surface resources thereon. The Henault Mining Company, a South Dakota corporation, appeared in response to the notice and filed verified statements that it was the owner of twenty-one lode mining claims included in the described area and that these claims were owned and held by it under and by virtue of their prior locations as mining claims under the federal mining law, 30 U.S.C. 23.

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In 1963 the Bureau served upon Henault notice of hearing before a Government hearing examiner wherein the Bureau charged that the locations of these claims prior to the Act of 1955 were invalid for the sole reason that each such location lacked the "discovery" required therefore by 30 U.S.C. 23. In the evidentiary hearing that followed, Henault relied principally upon the testimony of a nationally recognized mining-geologist of wide practice and experience and professionally considered as a foremost authority on the gold and silver deposition and production of this established gold mining district.

The hearing examiner specifically found that there was exposed, on each of the eighteen claims involved, a vein carrying some amounts of gold and silver, though not in commercial quantities (App., *infra*, p. 3). The examiner then accepted the considered opinion of Henault's expert witness as based upon reasonable geological certainty and to the effect that the exposed veins represented upward leaks from, and could be followed to, valuable concentrations of gold and silver existing at economically mineable depths below. Based upon his professional experience, technical knowledge and examination of the particular area, Henault's expert witness recommended a program of advanced exploration, at a cost in excess of $150,000.00, as the second stage in the development of a profitable mine upon these claims.

During the evidentiary hearing the Government admitted two of the locations were valid by reason of its own assay reports, and these claims were dropped from contest. A third claim fell for lack of any assay. As to the remaining eighteen claims, the hearing examiner then applied the "prudent man test" for meeting the "discovery" requirement for location of these claims under 30 U.S.C. 23, and concluded that the locations of these claims were valid (App., *infra*, p. 10) and the Government proceedings were dismissed.

Throughout the evidentiary hearing, the Henault Mining Company sought to introduce evidence that these mining claims contained no commercial timber, were not valuable for grazing or building sites and were, in fact, held and claimed in good faith for mining purposes. Such evidence was opposed by the Government and rejected by the hearing examiner as being immaterial (App., *infra*, pp. 20, 23-24). Although Henault raised this issue throughout subsequent review, the Secretary of Interior rejected it as immaterial (App., *infra*, p. 53), the federal District Court below deemed consideration of such evidence unnecessary to its decision (App., *infra*, p. 71), and the Circuit Court of Appeals below ignored the question of its relevancy and materiality.

The Government appealed from the hearing examiner's decision and the Secretary of Interior affirmed (App., *infra*, pp. 36-54) the reversal thereof by the Department of Interior Office of Appeals and Hearings (App., *infra*, 25-35). In setting aside the decision of the hearing examiner, the Secretary accepted the findings and established facts set forth therein (App., *infra*, p. 45-46), but characterized such evidence as "geological inference" and therefore unacceptable for establishing the "discovery" required by 30 U.S.C. 23 (App., *infra*, p. 52).

The Secretary of Interior in his decision, ruled that under the Department's interpretation of that "prudent man test" Henault must first carry out and complete the recommended program of advanced exploration before its claims met the statutory requirement for location under 30 U.S.C. 23 (App., *infra*, pp. 47-48).

Petitioner Henault then brought an action for declaratory judgment under 28 U.S.C. 2201 et seq., and review of the actions and decision of the Bureau and Department under the Administrative Procedures Act, 5 U.S.C. s.s. 1000-1009, alleging jurisdiction and venue in the federal District Court

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for the District of Montana. Both Henault and the Government moved for summary judgment upon the complaint and answer therein, and the federal District Court adopted the findings and established facts set forth in the hearing examiner's decision (App., *infra*, p. 58, f.n. 6), and, noting that the Secretary of Interior had also accepted without question those findings and established facts (App., *infra*, p. 71, f.n. 17), decided that such met the legal requirements for "discovery" required by 30 U.S.C. 23, under the judicially approved "prudent man test" and remanded the matter to the Secretary of Interior for further proceedings in accordance with the court's decision (App., *infra*, pp. 75-76).

The Government appealed from the District Court's decision and judgment and the Ninth Circuit Court of Appeals reversed the lower District Court in an opinion which postulates its decision upon the premise that "a reasonable prediction that valuable minerals exist at depth will not suffice as a 'discovery' where the existence of these minerals has not been established" (App., *infra*, p. 78). That postulate assumes "the presence of minerals has not been established" and is literally and utterly contradictory of the accepted finding of fact "that the evidence is conclusive that there are exposed within the limits of each claim*** veins or lodes of rock in place containing some amounts of gold and silver" (App., *infra*, pp. 3, 20).

Henault thereafter filed its timely petition for rehearing in banc. The Circuit Court below denied the petition for rehearing on January 23, 1970 and modified its previous decision to include a second postulate that "[I]n the case before us, no vein has been discovered at all" (App., *infra*, p. 84). This second postulate also contradicts the same basic finding of fact (App., *infra*, p. 3, 20).

REASONS FOR GRANTING THE WRIT

It is true that this Court only recently gave its attention to the subject of the federal mining law and the "prudent man test" inherent therein. (See *United States v. Coleman*, 390 U.S. 599 (1968)). However, this case involved an *actually exposed ore body* which, under existing economic conditions, could not be reasonably expected to result in a profitable mining operation. Here we are concerned with a *scientifically predicted ore body* which, under existing economic conditions, can reasonably be expected to result in a profitable mining operation.

The Department's denial of the "circumstances" contained in the findings and established facts as "geological inference" and the requirement that the ore body predicted thereby be actually exposed brings into sharp focus a subject of immediate concern to Congress and the national welfare – is the present federal mining law, with its inherent prudent man test broad enough to contemplate and permit the use of modern scientific methods in support of a valid location of mining claims?

It is a generally accepted phenomena that most of the Nation's surface and near surface deposits of essential minerals have already been discovered and that modern and future mineral exploration and development must henceforth be conducted at ever increasing depths.[1/] Also that the modern industrial world is dependent upon an adequate mineral supply more than at any other time in the history of

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[1/]See Sult, *Marketability and the Mining Law: The Effect of United States v. Coleman*, 10 Arizona Law Review 391 (1969), republished in the Rocky Mountain Mineral Law Review, Vol. 7, Fall 1969, No. 1, pp. 77, 102.

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mankind.[2] The urgent necessity to foster and encourage such exploration and development is apparent in the Mining and Minerals Policy Act of 1969 (s. 719) now before Congress.

The policy of the Department of Interior, as reflected by the rulings and actions herein, tends to make the national need to encourage mineral exploration secondary to its own interests.[3]

The solution of the questions presented herein is of immediate importance to the impending consideration of the entire system of the federal mining law by Congress which awaits the recommendations of the Public Land Law Review Commission.

ARGUMENT

The ruling first questioned herein, which characterizes the findings and established facts herein as "geological inference" and rejects the same as such, is based upon a Department decision made in 1911.[4] The Department's ruling that "geological inference", no matter how strong, cannot be used as a "circumstance" in establishing statutory "discovery" under the "prudent man test" has no judicial support and totally ignores over fifty years of progress in the science of

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[2] Forman & Dwyer, *The Prudent Man's Changing View of Discovery Under the U.S. Mining Laws*, Natural Resources Lawyer, Vol. II, No. 2, May, 1969, p. 109-110, Journal of the Section of Natural Resources Law American Bar Association.

[3] Parr, *Government Initiated Contests Against Mining Claims – a Continuing Conflict*, 1968 Utah Law Review 102, republished in 6 Rocky Mountain Mineral Law Review, Part 1 – Reprints, p. 1 (1968).

[4] *East Tintic Consolidated Mining Co.*, 40 L.D. 271 (1911). That decision was later withdrawn upon the development of a factual situation almost identical but of somewhat less strength than the findings and established facts of the case here involved. See *East Tintic Consolidated*, 43 L.D. 79 (1914).

geology. The ruling very effectively denies to the mining industry the benefit of scientific knowledge upon which modern exploration and development of mineral resources grows more dependent each day. It would seriously curtail the risk capital and unduly increase expenditures necessary in future mineral exploration.

The second ruling of the Department involved herein is that which requires that the justifiable exploration program for reaching a paying concentration of metallics be completed without statutory assurance of valid location. Such a requirement ignores the rationale which immediately follows the origin of the "prudent man test" (See *Castle v. Womble*, 19 L.D. 455, 457). The absurdity of such a requirement as herein made by the Department is clearly recognized by judicial decision. (See for example *Book v. Justice Mining Co.*, 58 Fed. 106, 120).

Lastly, the language of this Court in *Coleman* (supra, p. 602, 603), clearly demonstrates that the evidence of good faith and the land's lack of surface resources is material and relevant. Such evidence bears upon the charge of this Court to the Department in the latter's administration of the public land laws, (See *Cameron v. United States*, 252 U.S. 450, 460) and, would seem most relevant to subsequent review of such Departmental adjudicative functions under the Administrative Procedures Act, 28 U.S.C. s.s. 1000-1009.

CONCLUSION

The mining industry obviously cannot be expected to commit the high risk capital involved in justifiable deep exploration without the statutory protection now being denied it by Departmental policy and rulings such as are involved herein. And the present uncertainty as to the legality of such Departmental policy and rulings creates a null

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in present and future mineral exploration that has serious portent for the public welfare and national defense.

We respectfully submit that the questions presented herein are important questions of federal law which have not been, but should be, settled by this Court and that the Petition for Certiorari should be granted.

Respectfully submitted,

Charles E. Carrell
Attorney for Petitioner
Room# 210 Mellgren Building
520 Kansas City St.,
Rapid City, S. Dak. 57701

April, 1970

APPENDIX

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Office of Hearing Examiners
4209 Federal Building
Salt Lake City, Utah 84111

July 10, 1964

DECISION

UNITED STATES, Acting through Bureau of Land Management,	:	MONTANA 035391 (SD)-B and MONTANA 037135 (SD)-C, Involving surface rights as to Red Beard, McLaughlin, Keno, Gold Mine, Blanche B., W. S. Stratton Nos. 4 and 5, Ice Pond, Joseph, Gold Mine Fraction, Gold Mine No. 1, Bonaparte, Pearl, Carline, Rescue Bond Nos. 2 and 3, Strawberry Nos. 1 and 2, and Automobile lode mining claims, in Lawrence County, South Dakota.
v.		
HENAULT MINING COMPANY, Mining Claimant		

Automobile Claim Held Subject To Section 4, Public Law 167; Proceeding Dismissed As To All Other Claims

This proceeding was brought pursuant to section 5 of Public Law 167 (act of July 23, 1955; 69 Stat. 367). Section

4 of this law provides in essence that unpatented mining claims located after July 23, 1955, are subject to the right of the United States to manage the vegetative and other surface resources thereof (other than mineral deposits subject to location under the mining laws of the United States) provided that such surface use by the United States shall not endanger or materially interfere with prospecting, mining, or processing operations or uses reasonably incident thereto on such claims. As to claims located prior to July 23, 1955, P. L. 167 prescribes procedure whereby mining claimants may assert that they have the right to such nonmineral surface resources. Such assertion by mining claimants must be made by means of a verified statement filed within 150 days after first publication of a notice to this effect relative to lands including their mining claims.

The mining claimant named herein filed verified statements on February 18 and October 3, 1960, asserting surface rights as to the claims identified above. Thereafter, notice of hearing was issued containing the charge of the Bureau of Land Management that a discovery of valuable mineral has not been made within the limits of any of the above-listed unpatented mining claims. The hearing was held on October 22, 23, and 24, 1963, at Rapid City, South Dakota. Roy F. Allen and Gary Fisher, Office of the Field Solicitor, Department of Interior, Billings, Montana, represented the United States; Charles E. Carrell, attorney, Rapid City, South Dakota, represented the mining claimant.

From the evidence presented at the hearing I hereby make the following:

Findings of Fact

The basic facts concerning the location, ownership, workings, and surface mineralization of the claims are not in

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dispute. The claims in question were located prior to the passage of Public Law 167, supra, and are presently owned by the Henault Mining Company. Extensive examinations were made by geologists employed by the mining claimant and by the Government during which samples were taken from the various pits, cuts, and adits upon the claims, and assayed for gold and silver values. The mineral values found in the assays of the samples taken by Mr. Ernest T. Touchek, a geologist employed by the United States, and by Mr. Ernest Shepherd, a geologist working under the supervision of Lawrence B. Wright, a consulting geologist retained by the Henault Mining Company, are tabulated in Appendix A. Mr. Touchek took his samples during the period between August 21 and September 28, 1961; Mr. Shepherd took his samples over a two-month period in August and September of the same year. During the course of their examinations the two men met occasionally but their work was entirely separate and they did not necessarily sample in precisely the same places. A comparison of the values found in the samples taken by the two men reveal, within the limits of human tolerance, similar results. Although the gold and silver content of the samples taken varied from trace amounts to a high of $15.87 a ton, the values found in the majority of the samples range from 9 cents to less than $1 per ton. The evidence is conclusive that there are exposed within the limits of each claim (except the Automobile lode) veins or lodes of rock in place containing some amounts of gold and silver. It is also conclusive that there is no surface exposure on any claim of minerals which can be mined at a profit.

All the experts in the field of geology testified that the land upon which the claims are located is mineral in character. The claims are surrounded by patented mining claims and lie immediately adjacent to the present working

area from which the Homestake Mining Company, the largest gold producer in the United States, is extracting ore at a profit.

The geology of the area in which the claims are located and the significance of the structures found on and beneath the claims are summarized in the geologic report dated June 21, 1948, submitted by Mr. Lawrence B. Wright to the Henault Mining Company (mining claimant's exhibit No. 2) and in his economic and structural geology report dated October 31, 1961 (mining claimant's exhibit No. 3). Mr. Wright has an intimate knowledge of the geology of the area upon which the claims are located. He was employed by the Homestake Mining Company in Lead, South Dakota, from 1919 to 1931, and for the last six years of this employment he was chief geologist for that company. He is thoroughly familiar with all of the mining and geologic technical publications on the Black Hills region, and conducted and supervised the examination of the Henault claims which culminated in the 1948 and 1961 reports. His conclusions as summarized in the 1961 report are as follows:

1. That the Henault Mining Company's claim group lies within the province of major gold mineralization in the Black Hills.

2. That the claims lie adjacent to the country's greatest producer of gold which is of no significance except that the geologic structural relations are such that the proximity has real value.

3. That the geology of the Henault ground is structurally related to that of the Homestake Mining Company's

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ground and ore deposits in such a manner that the possibility of deep ore deposits such as are being developed by Homestake may reasonably be expected at minable depths at Henault.

4. The values in gold and silver existing in Henault ground can only lead to the conclusion that these surface expressions are "upward leaks" effected at the time of mineralization from substantial deposits below.

5. That the tertiary dike zone through the center of the Henault claims emplaced in an anticlinal structure (believed to elevate the favorable Homestake formation closer to the surface) is additional incentive to moderately deep exploration for substantial amounts of ore.

6. That all Henault holdings are of mineral character and, considering that almost all surrounding grounds have been patented, are entitled to the same consideration for patent.

Mr. Wright then recommended that at least three holes be drilled to a depth of 3500 to 4000 feet. At an estimated cost of $14.50 per foot the cost of such drilling would entail expenditures of $360,000 to $480,000.

The soundness of Mr. Wright's analysis was not challenged. Both Mr. Touchek and Mr. Parker Davies, geologists employed by the Government, testified that in their opinion the land upon which the claims are located is mineral in character; this is equivalent to admitting that it is potentially valuable for its mineral content. In so doing, the Government experts took into consideration geological inference. How-

ever, they did not attach the same importance to the geology of the region in arriving at their opinions as to whether or not discoveries of valuable mineralization exist on each claim.

The significant value of Mr. Wright's reports was emphasized by the testimony of Professor Edwin H. Oshier, a mining engineer who for the past ten years has held the position of head of the Department of Mining Engineering at the South Dakota School of Mines and Technology. He is acquainted with the geology of the northern Black Hills, having studied it in connection with his teaching and has also had a very close relationship with the staff at the Homestake mine. He testified that Mr. Wright's reputation as a geologist is excellent and that he is considered an authority on the geology of the northern Black Hills.

In Professor Oshier's opinion, the examinations and reports by Mr. Wright comprise a very thorough geologic study. Based solely upon the type, quantity, and nature of these reports, he would willingly recommend that further monies be spent in developing the group of claims in question.

Although Mr. Touchek's and Mr. Davies' qualifications as competent geologists cannot be questioned, neither man has as thorough a knowledge of the geology of the region, nor did their examinations, from a geologic standpoint, approach in thoroughness the examinations made by Mr. Wright. I therefore accept the recommendations made by Mr. Wright as to the possibilities for following the veins or lodes on the surface of the Henault Mining Company claims as being the best available information upon which a prudent man would rely.

From the foregoing findings of fact I hereby make the following:

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CONCLUSIONS OF LAW

The Government contends that the surface resources of the land are subject to its administration under Public Law 167, supra, because the claimants have not made a valid discovery of valuable minerals within the limits of any of the contested locations. The primary issue then to be determined is whether or not a valid discovery has been made on each of the claims in issue. The definition of a valid discovery sufficient to validate a mining claim upon the public domain was first set forth in the decision of Castle v. Womble, 19 L. D. 455, as follows:

> "Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

This decision was approved by the United States Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905) and in Cameron v. United States, 252 U.S. 450 (1920). Later, in the case of Jefferson-Montana Copper Mines Company, 41 L.D. 320 (1912) the land department further elaborated upon the "prudent man" test as applied to lode claims as follows:

1. There must be a vein or lode of quartz or other rock in place;

2. The quartz or other rock in place must carry gold or some other valuable mineral deposit;

3. The two preceding elements when taken together must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine.

In the present case the Government objected, on the grounds that geological inference cannot be used to establish discovery, to the admission in evidence of Mr. Wright's 1948 and 1961 reports, all testimony of the geology of the region, and all reference to the proximity of the claims to the Homestake Mining Company workings. While it is true that the courts and the Department of the Interior have never accepted geological inference standing alone, however strong, as a substitute for an actual exposure of valuable mineral sufficient to constitute a discovery, such evidence is of prime importance in determining whether or not values exposed in veins or lodes, if followed, could reasonably be expected to lead to greater values at depth. In the Jefferson-Montana Mines Company case, the Department elaborated upon some of the factors which must be considered provided the first two conditions of a valid discovery are present:

> "It is clear that many factors may enter into the third element: the size of the vein as far as disclosed, the quality and quantity of mineral it carries, its proximity to working mines and location in an established mining district, the geologic conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts, would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not."

Thus, evidence as to the geology of the region, the proximity of the claims to working mines, the economics of mining, and any other fact or circumstance which might possibly affect the success of a mining venture, would necessarily be considered by a prudent man in determining whether or not he would expend further time and money in following the veins or lodes exposed, and is relevant evidence.

It has been established that on each of the claims, except the Automobile, there are veins or lodes of rock in place containing valuable minerals. Although most of the assays revealed nominal or very low values which could not in any sense be considered worthwhile to mine, nevertheless the mineralization is there. In expressing opinions that no discovery had been made upon any of the claims, based upon their understanding of the law, Mr. Touchek and Mr. Davies failed to take into full consideration the favorable geology of the area in which the claims are situated. If the facts were such that the nominal values found upon the surface or exposed upon the surface were not connected to or leading to higher values at depth, Mr. Davies' and Mr. Touchek's understanding of the law would be correct. However, Mr. Wright testified in his deposition that the values found are sufficient to indicate what, in geology, is called a leak or an upward migration of gold and silver values from the better ore at depth in the underlying Homestake formation. Professor Oshier also stated that the presence of gold and silver ore in the younger beds of the pre-Cambrian complex on the surface is indicative of the presence of economically minable older Homestake formation beneath the younger beds exposed on the surface of the claims.

Although Mr. Wright recommended that patent application be limited to five claims, he stated in his deposition he did not intend to convey by inference that the remaining claims

were not valid. The recommendation for patenting only five claims initially was made primarily in consideration of economy because of the high cost of patenting all twenty claims.

Each claim must be judged upon its own merits. Each lode claim must contain an exposure of a vein or lode which meets the requirements as set forth in the case of Jefferson-Montana Copper Mines Company, supra. With respect to the Automobile claim these requirements have not been met. Neither party found or sampled any structures as there were no pits or evidence of prospecting on this claim. The prima facie case in support of the allegation thus established has not been rebutted. The Automobile claim is therefore declared to be subject to the right of the United States to manage and dispose of the vegetative and other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). This decision does not preclude the mining claimant from holding, resurveying, and developing this claim for legitimate mining purposes.

I further conclude that on each of the remaining claims there is an exposure of valuable mineralization sufficient to satisfy the requirements of the mining law as to discovery. This conclusion admittedly rests squarely on the acceptance of Mr. Wright's recommendations. Although these recommendations are based upon what technically can be termed as theory, and therefore there is no guarantee that a paying mine will result, the law does not require a guarantee of success, only a reasonable prospect of such.

Taking into consideration the excellent reputation and qualifications of Mr. Wright and his thorough, detailed studies, it would be imprudent to ignore his recommendations. On each of the claims, except Automobile, the prospecting work has been done and the Henault Mining

Company has either a discovery of mineralization which can be explored to fruition or disappointment, or it has not. If, in the face of the evidence presented, it were held that no discovery had been made it would be tantamount to holding that no discovery exists until paying ore is exposed. This is not the law.

The Government has set forth the proposition that even if paying ore is found at depth, this ore may belong to the Homestake Corporation on the basis of the apex law of mining. Briefly, the apex law requires that the discovery point for a lode claim must be on the top or apex of the vein and that if a discovery is on the dip or downward course of a vein the apex of which is in another valid location or patented mining claim, no rights are initiated or acquired by the discovery on the dip and that such a discovery is wholly illegal and void. It is not within the province of this proceeding, but is a matter for the local courts, to determine whether the Homestake Company or the mining claimant may have title to the underlying ore in the Homestake formation underlying the claims in question. However, evidence concerning this question is relevant as it may affect the decision as to whether a prudent man would be justified in spending further time and money on the claims; obviously, he would not be prudent were he to knowingly develop a mine containing ore belonging to someone else.

In commenting on this aspect of the testimony, Professor Oshier stated that he did not believe the Homestake formation would be controlled by the apex law because of the individual ledges in a very complex formation which makes it impossible to determine the apex of the whole formation. On this point, Mr. Wright, in his report of October 31, 1961, to the Henault Mining Company, made this comment on page 4:

"As will be shown later in this report, Henault property lies in a position so as to bring it into this favored category following deeper exploration. There is some doubt that the Denis Henault group realized this, although it must be taken into consideration that in 1888 Homestake had been in business for ten years or more and their workings were progressing southeastward at a rapid rate, and in the general direction, in depth, of the Henault property. Here, the question of apex rights arises; a legal matter in which Henault has adequate protection since up-raises from expected ore would lead to barren ground. Hence they would enjoy the rights of a sub-surface apex. This statement appears to be contradictory, i.e., 'trend of ore toward Henault ground' vs. 'up-raise from Henault would lead into barren ground'. Mineralization along beds of host rock is not everywhere continuous; the beds themselves lose continuity through faulting and sharp folding. Geologically the problem is too complex to cover adequately in a report of this nature."

Thus, the best evidence available at this time indicates that the Henault Mining Company would have title to mineral values found in the Homestake formation beneath its claims.

The allegation of nondiscovery not having been sustained as to the Red Beard, McLaughlin, Keno, Gold Mine, Blanche B., W.S. Stratton Nos. 4 and 5, Ice Pond, Joseph, Gold Mine Fraction, Gold Mine No. 1, Bonaparte, Pearl, Carline, Rescue Bond Nos. 2 and 3, and Strawberry Nos. 1 and 2 lode mining claims, the proceeding as to these claims is dismissed.

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Proposed findings of fact submitted by the mining claimant, with rulings thereon, are set forth in Appendix B.

This decision becomes final 30 days from its receipt unless an appeal to the Director, Bureau of Land Management, is filed with the Office of Hearing Examiners, Salt Lake City, Utah. If an appeal is taken there must be strict compliance with the regulations in 43 CFR Part 1840. (See enclosed Form 1842-1. If an appeal is taken by the United States, the adverse party to be notified is the attorney for the mining claimant identified below with his address.

(Signed) JOHN R. RAMPTON, JR.
John R. Rampton, Jr.
Hearing Examiner

By certified mail to:

Office of the Solicitor
Department of the Interior
P. O. Box 1538, Billings, Montana

Mr. Charles E. Carrell, Attorney (for mining claimant)
P. O. Box 1828, Rapid City, South Dakota

By regular mail to:

Standard distribution list

Note: Claims listed in the verified statements and in this decision and its appendices as Rescue Bond Nos. 2 and 3 are the same as those listed in exhibits as Rescue Band Nos. 2 and 3.

Appendix A

GOLD AND SILVER VALUES OF SAMPLES

Government Samples

Claims	Sample No.	oz/ton Gold	oz/ton Silver	Value@ $1.10 oz.
Red Beard	B-2-1	None	Trace	$---
	B-2-2	Trace	0.1	0.11
	B-2-3	None	0.1	0.11
McLaughlin	B-3-1	None	Trace	---
	B-3-2	Trace	0.1	0.11
	B-3-3	None	Trace	---
	B-3-4	Trace	0.2	0.22
	B-3-5	None	Trace	---
	B-3-6	None	Trace	---
Keno	B-4-1	Trace	0.1	0.11
	B-4-2	None	Trace	---
	B-4-3	Trace	0.1	0.11
	B-4-4	Trace	0.3	0.33
	B-4-5	None	Trace	---
Joseph	B-5-1	None	Trace	---
	B-5-2	None	0.1	0.11
	B-5-3	0.015	0.2	0.75
	B-5-4	0.005	0.2	0.40
	B-5-5	0.005	0.1	0.29
	B-5-6	None	Trace	---
Gold Mine	B-7-1	None	0.1	0.11
	B-7-2	0.005	0.1	0.29
	B-7-3	Trace	0.2	0.22

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Appendix A

GOLD AND SILVER VALUES OF SAMPLES

Mining Claimant's Samples

Claims	Sample No.	oz/ton Gold	oz/ton Silver	Value @ $. 90 oz.
Red Beard	Rd B-1	0.003	None	$ .10
	Rd B-2	Trace	None	---
McLaughlin	M-1	0.005	None	0.17
	M-2	0.010	0.2	0.53
	M-3	Trace	0.1	0.09
	M-4	Trace	0.3	0.27
	M-5	Trace	None	---
	M-6	Trace	0.1	0.09
	M-7	0.005	1.0	1.07
	M-8	Trace	0.1	0.09
	M-9	Trace	0.2	0.18
	M-10	Trace	0.1	0.09
Keno	KL-1	0.20	9.8	15.87
	KL-la	0.010	0.8	1.07
	KL-2	0.005	0.2	0.35
	KL-4	0.025	0.1	0.96
	KL-5	0.015	0.4	0.88
	KL-6	Trace	0.2	0.18
	KL-7	Trace	0.1	0.09
	KL-8	Trace	0.1	0.09
	KL-9	0.1	3.8	6.92
	KL-10	0.035	None	1.23
	KL-10	0.010	0.21	0.54
Joseph	J-1	Trace	0.1	0.09
	J-2	Trace	0.1	0.09
	J-3	0.005	0.3	0.44
	J-4	0.030	0.1	1.14
	J-5	Trace	0.2	0.18
	O-9	0.005	0.1	0.27
Gold Mine	GM-1	Trace	None	---

Government Samples

Claims	Sample No.	oz/ton Gold	oz/ton Silver	Value @ $1.10 oz.
Gold Mine Fraction	B-8-1	Trace	Trace	$---
	B-8-2	Trace	Trace	---
Gold Mine No. 1	B-9-1	Trace	0.1	0.11
	B-9-2	None	Trace	---
	B-9-3	Trace	0.1	0.11
	B-9-4	Trace	0.2	0.22
	B-9-5	None	0.1	0.11
	B-9-6	None	Trace	---
	B-9-7	Trace	0.1	0.11
Bonaparte	B-10-1	None	0.1	0.11
	B-10-2	None	None	---
	B-10-3	Trace	0.1	0.11
	B-10-4	Trace	Trace	---
	B-10-5	None	None	---
Blanche B.	B-11-1	Trace	0.1	0.11
	B-11-2	None	0.1	0.11
	B-11-3	Trace	0.2	0.22
W. S.Stratton No. 4	B-12-1	None	0.1	0.11
	B-12-2	Trace	0.2	0.22
W. S. Stratton No. 5	B-13-1	None	0.1	0.11
	B-13-2	None	0.1	0.11
Pearl	B-14-1	None	Trace	---
	B-14-2	None	Trace	---
	B-14-3	0.005	Trace	0.18
Carline	B-15-1	None	None	---
	B-15-2	None	Trace	---

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Mining Claimant's Samples

Claims	Sample No.	oz/ton Gold	oz/ton Silver	Value @ $ .90 oz.
Gold Mine Fraction	GMF	Trace	0.2	$0.18
Gold Mine No. 1	GM 1-1	Trace	0.0	---
	GM 1-2	Trace	0.2	0.18
	GM 1-3	Trace	0.0	---
	GM 1-4	Trace	0.0	---
Bonaparte	B-1	Trace	0.2	0.18
	B-2	Trace	0.1	0.09
Blanche B.	B 1-1	Trace	0.0	---
	B 1-2	Trace	0.2	0.18
W. S. Stratton No. 4	St 4-1	Trace	0.2	0.18
	St 4-2	Trace	0.1	0.09
	St 4-3	Trace	0.0	---
W. S. Stratton No. 5	St 5-1	Trace	0.2	0.18
Pearl	P 1-1	Trace	0.1	0.09
	P 1-2	0.025	0.1	0.96
	P 1-3	Trace	0.0	---
Carline	C-1	Trace	0.1	0.09
	C-2	Trace	0.1	0.09
	C-3	Trace	0.1	0.09
	C-4	Trace	0.1	0.09

Government Samples

Claims	Sample No.	oz/ton Gold	oz/ton Silver	Value @ $1.10 oz.
Ice Pond	B-16-1	None	0.1	$0.11
	B-16-2	None	0.2	0.22
	B-16-3	Trace	0.1	0.11
	B-16-4	None	Trace	---
	B-16-5	None	0.1	0.11
	B-16-6	Trace	0.1	0.11
Rescue Bond No. 2	C-1	None	0.1	0.11
Rescue Bond No. 3	C-2-1	None	0.1	0.11
	C-2-2	Trace	0.2	0.22
	C-2-3	None	0.1	0.11
	C-2-4	None	0.1	0.11
Strawberry No. 1	C-3-1	Trace	0.2	0.22
	C-3-2	None	0.1	0.11
	C-3-3	None	0.2	0.22
	C-3-4	None	0.1	0.11
	C-3-5	None	Trace	---
	C-3-6	0.005	0.1	0.29
Strawberry No. 2	C-4-1	None	0.1	0.11
	C-4-2	None	0.1	0.11
Automobile	No samples taken			

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Mining Claimant's Samples

Claims	Sample No.	oz/ton Gold	oz/ton Silver	Value @ $. 90 oz.
Ice Pond	IP-1	0.003	0.1	$0.19
	IP-2	Trace	0.1	0.09
	IP-3	Trace	0.0	---
	IP-4	Trace	0.5	0.45
	IP-5	Trace	0.3	0.27
	IP-6	Trace	0.2	0.18
	IP-7	0.010	0.2	0.55
	IP-8	Trace	0.1	0.09
	IP-9	Trace	0.2	0.18
	IP-10	0.015	0.2	0.70
Rescue Bond No. 2				
Rescue Bond No. 3	RB-1	Trace	0.2	0.18
	RB-2	Trace	0.1	0.09
	RB-3	Trace	0.1	0.09
	RB-4	Trace	0.1	0.09
Strawberry No. 1	S 1-1	Trace	0.0	---
	S 1-2	0.01	0.1	0.44
	S 1-3	Trace	0.1	0.09
	S 1-4	0.005	0.1	0.26
Strawberry No. 2	S 2-1	Trace	0.0	---
Automobile	No samples taken			

Appendix B

MINING CLAIMANT'S PROPOSED FINDINGS OF FACT AND HEARING EXAMINER'S RULINGS THEREON

Proposed Findings Nos. 10, 11, and 12 are rejected as being immaterial.

Proposed Findings Nos. 1, 2, 3, 4, 7, 8, and 13 are accepted.

Proposed Findings Nos. 5, 6, 9, and 14 are accepted when modified as stated following each of these findings.

Proposed Finding No. 1

That the Red Beard Lode, McLaughlin Lode, Keno Lode, Joseph Lode, Gold Mine Lode, Gold Mine Fraction Lode, Gold Mine No. 1 Lode, Bonaparte Lode, Blanche B Lode, W. S. Stratton No. 4 Lode, W. S. Stratton No. 5 Lode, Pearl Lode, Carline Lode, Ice Pond Lode, Rescue Bond No. 2, Rescue Bond No. 3, Strawberry No. 1 Lode, and Strawberry No. 2 Lode are a group of adjoining and contiguous unpatented lode mining claims held and located by the Henault Mining Company in Lawrence County in the Northern Black Hills of South Dakota under the mining laws of the United States.

Proposed Finding No. 2

That there has been exposed within the limits of each claim enumerated above a vein of rock in place carrying gold and silver.

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Proposed Finding No. 3

That the land upon which these claims are located is mineral in character and is within one of the oldest, most productive and established gold mining districts in the United States, and the claims are surrounded by patented lode mining claims.

Proposed Finding No. 4

This group of claims is adjacent to and at places are less than a thousand yards from the presently working area from which the Homestake Mining Company is now, and has been for over fifty years, extracting ore that causes it to be ranked as the largest producer of gold in the United States.

Proposed Finding No. 5

The gold and silver bearing veins thus exposed on the surface of these claims are highly mineralized, Tertiary intrusions – rhyolite dikes – are geologically similar to the dike ensemble outcropping at the surface of the Homestake workings which have been actually observed and are known to continue to great depths beyond that of the underlying stratographic formation known as the Homestake formation and it is at the levels where this dike ensemble or Tertiary intrusion penetrate that Homestake formation that the Homestake Mining Company produces its ore, almost exclusively.

Modification: Finding accepted with deletion of "highly" from second line of this finding.

Proposed Finding No. 6

This overlying bed of host rock known as the Homestake formation proven to be the best and most productive host rock for the precipitation of gold in this established mining district, and from which the Homestake ore is exclusively produced almost without exception, has been observed to be proceeding in the direction of these Henault Mining claims as the Homestake Mining Company operation is following it; this same Homestake formation has been actually observed to outcrop across and beyond this Henault group of claims; and in the opinion of Lawrence B. Wright, Dr. Hans Lunberg and Professor Edwin Oshier, all mining geologists and consultants of national repute, based upon actual personal firsthand studies of this Homestake formation, the Homestake formation continues and underlies these Henault Mining Company claims.

Modification: Finding accepted with substitution of "underlying" for second word, "overlying."

Proposed Finding No. 7

That it is established and accepted geologically that these mineralized Tertiary dikes, exposed on the surface of these claims and carrying gold and silver to the surface, have as their source and origin, and can be followed to, a depth much greater than the 6800 foot level (depth) at which the Homestake Mining Company is presently working the Homestake formation.

Proposed Finding No. 8

That it is the opinion of two mining geologists of many

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years experience and of national prominence in this field, based upon the surface indications, the assay reports, the geological indications, the known and proven geology of the area, actual knowledge of the nature, depth and direction of the workings of the adjoining Homestake Mine, the geological similarity between the structure upon which these claims are located and the structure from which the Homestake Mine is producing its ore, that a prudent man would be justified in the further expenditure of his time and money with a reasonable prospect of success in developing a paying mine upon these claims.

Proposed Finding No. 9

That lying within and forming an integral part of this group of claims of the claimant are the Globe Fraction and the Joseph Lode mining claims upon which during the course of these proceedings, the Bureau of Land Management, has admitted and conceded that a prudent man would be justified in the expenditure of further time and money with a reasonable prospect of success in developing a valuable mine.

Modification: Accepted with substitution of "Oscar" instead of "Joseph."

Proposed Finding No. 10

That the ground upon which these claims are located contains no timber of commercial value, is not usable for grazing or recreational purpose, and has not been, nor is contemplated to be used for building sites.

Proposed Finding No. 11

That these claims are located and held by the mining

claimant in good faith for the purpose of acquiring this land because of its mineral deposits.

Proposed Finding No. 12

That the mining claimant itself is convinced that further expenditure of time and effort can be reasonably expected to develop a valuable mine on these claims and has objectively substantiated this belief by the expenditure of at least $57,000.00 in assessment work upon these claims since 1945.

Proposed Finding No. 13

That a prudent man would be warranted in the expenditure of his time and money in the effort to develop a valuable mine upon the claims involved in this proceeding.

Proposed Finding No. 14

That a discovery of valuable mineral has been made within the limits of each of the following unpatented lode mining claims: Red Beard Lode, McLaughlin Lode, Keno Lode, Joseph Lode, Gold Mine Lode, Gold Mine Fraction Lode, Gold Mine No. 1 Lode, Bonaparte Lode, Blanche B Lode, W. S. Stratton No. 4 Lode, W. S. Stratton No. 5 Lode, Pearl Lode, Carline Lode, Ice Pond Lode, Rescue Bond No. 2, Rescue Bond No. 3, Strawberry No. 1 Lode, and Strawberry No. 2 Lode.

Modification: Accepted but should be classified as a conclusion of law.

In reply refer to:
704
Montana 035391(SD)-B
037135(SD)-C

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D.C. 20240

August 12, 1965

Certified Mail
Return Receipt Requested

DECISION

United States, Acting through the State Director, Bureau of Land Management Billings, Montana, Appellant	:	Proceedings under the act of July 23, 1955 (P.L. 167), involving the Red Beard, McLaughlin, Keno, Gold Mine, Blanche B., W. S. Stratton Nos. 4 and 5, Ice Pond, Joseph, Gold Mine Fraction, Gold Mine No. 1, Bonaparte, Pearl, Carline, Rescue Bond Nos. 2 and 3, and Strawberry Nos. 1 and 2 lode mining claims situated in Ts. 4 and 5 N., R. 3 E., B.H.M., Lawrence County, South Dakota.
v.		
Henault Mining Company, Mining Claimant – Appellee		

DECISION REVERSED IN PART

The United States, acting through the State Director, Bureau of Land Management, Billings, Montana, has appealed from that portion of a Hearing Examiner's decision, dated July 10, 1964, dismissing the above-identified proceedings under Section 5 of the act of July 23, 1955 (30 U.S.C. sec. 613) as to all of the mining claims enumerated.[1/]

Section 4 of the act (30 U.S.C. sec. 612) provides, inter alia, that rights to mining claims thereafter located on public land under the mining laws shall be subject, prior to the issuance of patent, to the right of the United States to manage and dispose of the vegetative surface resources and to manage other surface resources, except mineral deposits subject to location under the mining laws. Section 5, supra, sets out the procedure whereby mining claims located before July 23, 1955, may be subjected under certain circumstances to the provisions of section 4. As provided in the procedure, mining claimants may assert that they have the right to such surface resources by filing a verified statement within 150 days of first publication of notice to mining claimants. To establish any right to the surface resources, a mineral claimant must prove that he has made a valid discovery within the meaning of the mining laws on each mining claim prior to July 23, 1955, the date of the act. United States v. Payne, 68 I.D. 250 (1961).

The Henault Mining Company, hereinafter referred to as Henault or mining claimant, filed verified statements within the time required asserting rights as to the unpatented mining

[1/] The Hearing Examiner held also that the Automobile lode claim was subject to section 4 of the act of July 23, 1955 (30 U.S.C. sec. 612), but the mining claimant did not appeal from this ruling. Accordingly, the Hearing Examiner's decision as to this claim has become final.

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claims identified herein, pursuant to published notices to mining claimants. The notice of hearing stated that the United States would offer evidence to prove that a discovery of valuable mineral has not been made within the limits of any of the therein-listed lode mining claims. Pursuant to an order of the Hearing Examiner depositions of Lawrence B. Wright and R. E. Shepherd, witnesses for the mining claimant, were taken on October 3, 1963, at San Francisco, California, before a certified shorthand reporter and notary public. A hearing was held on October 22, 23, and 24, 1963, at Rapid City, South Dakota.

At the hearing both the Government and the mining claimant presented evidence describing the mineral values found in the veins or lodes exposed on the claims involved. The Hearing Examiner found that a comparison of the values shows that the results are similar. He also concluded that there is no surface exposure on any claim of minerals that can be mined at a profit.

The Hearing Examiner's decision dismissing the proceedings as to the mining claims involved in the appeal, holds, in substance, that his finding that an exposure on each claim of valuable mineralization sufficient to satisfy the mining laws as to discovery rests squarely upon the Examiner's acceptance of the geologic theory of the mining claimant's consulting geologist to the effect that the values found on the surface are "leaks" or migrations of values from possibly the better ore at depth in the alleged underlying Homestake formation.

The mining claimant's expert geologist whose theory the Hearing Examiner accepted as the basis for decision testified in his deposition that he had an intimate knowledge of the geology of the region in which the Henault claims are situated by reason of his employment from 1919 to 1931 with the Homestake Mining Company. That company's

claims are within 3,000 feet west and north of the Henault claims. During the course of such employment he made a detailed study of the distribution of gold within the Homestake Mine, today's largest gold producer, and found that Homestake ore is almost exclusively found in a strategraphic unit which he named the Homestake, as a distinct geologic unit in a series of other units. He stated it had the ability to precipitate the gold from solutions when gold was introduced. At that time he traced the Homestake formation, a structure having an intricate folding pattern, and recorded its location on both surface and undergound maps. He related that he found a definite relationship between the gold distribution and the trend or presence of the dike ensemble which cuts through the Homestake properties. (Dep. p. 50-53).

From his examination of the surface rocks on the Henault claims in 1948 and the further examination of the claims in 1961, together with his personal knowledge of the geology of the district, in his opinion by extrapolation, there is a good possibility of a repetition of a gold deposition at the intersection of the tertiary dikes and the Homestake formation, which he would expect, by reason of his geometric projection, to occur in a favorable structure 3,500 to 4,000 feet beneath the Henault claims. In his estimation, it is a good geologic possibility sufficient to recommend fairly substantial expenditures in exploring the possibilities. (Dep. ps. 49, 58, 59 and 62).

The Government on appeal contends that the decision below admittedly rests upon the acceptance of a theory of what might exist at depth if the Homestake formation with its complex folds and dips underlays the Henault mining claims and if the Homestake formation, so laying, has ore bodies in it. It asserts that the theory is a geologic inference and such an inference has never been accepted as a substitute for a

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discovery of valuable mineral deposits.

The evidence and testimony of the mining claimant's experienced witness does not establish as an existing fact that the Homestake formation underlies the Henault claims in question. He assumes that it dips under the Henault claims and emerges to the south. (Dep. ps. 54, 58). In his report of 1948, he writes that:

> The purpose of this examination was the determination of the principal geological features, with emphasis on structure, to outline the probable location and depths of such formations as might be mineralized, and to study the best means of approach to the problem of exploration. (Exh. 2, p. 4).

His report recommends to the mineral claimant the initiation of an exploratory program consisting of drilling three deep test holes.

He testified:

> .... I felt the entire situation, the geologic environment and the surface showings justified a step of exploration and along those lines I recommended a limited diamond drilling program and I outlined approximately where I thought the drilling should take place on the properties. (Dep. p. 48).

With regard to exploring the possibilities he said in his desposition:

> Therefore, I believe that a prudent man would be justified in doing the exploratory work that I had

> recommended because the possible prize as against the drilling expenditure could be enormous and great. (Dep. p. 59).

Concerning his 1961 report to the mining claimant (Exh. 3), relating to 21 mining claims, wherein he recommended applying for a mineral patent for five mining claims, two of which are not involved in this proceeding, the geologist stated:

> I selected and suggested patenting those five claims mainly for economic reasons at this time and not to the exclusion of, possibly, applying for patent on the other claims. The main reason for the selection of these claims is because they lie very much on the anticlinal structure that we mapped and show on our map, Exhibit so and so here, and they would be the shoving off place for a drilling program. (Dep. p. 63).

Earlier in his testimony, the expert witness for the mining claimant, explained:

> . . . . [E]xploration might consist of sinking an exploratory vertical shaft or, if it is a very mountainous country, driving an adit into the mountain, or it might consist of doing nothing more than, in the beginning, than diamond drilling to test possibilities with depth. This is exploration.
>
> Now then, if the results of the exploration justify a further large expenditure, then you begin to develop the property by expanding your underground work or, if it is an open pit mine, by starting an open pit, for example. (Dep. p. 47-48).

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When asked whether the information accumulated to date on the Henault claims involved is adequate to recommend to the mining claimant that it begin sinking shafts and the driving of levels, he responded:

> That was not my recommendation and would not be my recommendation until exploration by diamond drilling proved successful and justified the second step. We take these things step by step. One step must justify the next one.
>
> * * * * * * * *
>
> They [Henault] have completed their examination. Now they are ready to start limited exploration. (Dep. ps. 67-68).

His testimony and exhibits at most indicate that the mining claims involved warrant further exploration to determine whether the Homestake formation is under the claims and whether it is sufficiently mineralized.

The mining claimant has the burden of establishing by a preponderance of the evidence that there is a valid discovery within the limits of each claim. Foster v. Seaton, 271 F. 2d 836 (1959). The mere hope or expectation, based upon a general belief, that values will increase at depth is not sufficient to establish a valid discovery. Cf. United States v. Duvall and Russell, 65 I. D. 485 (1958).

It is inherent in the elements and factors set forth by the Department as a test for lode claims in Jefferson-Montana Copper Mines Company, 41 L. D. 320 (1912), quoted in the decision below, that to constitute an adequate discovery under the mining laws it must be conclusively established by competent evidence that a mineral deposit has been found and physically uncovered within the limits of each mining claim located, and that the situation and formation of the

mineral so found and uncovered are such as to justify a prudent man in the further expenditure of time and money, with a reasonable prospect of success, in developing a paying mine. It is not sufficient to constitute a discovery that mineral showings indicate only that more exploratory work is warranted. In United States v. Clyde R. Altman et al., 68 I. D. 235 (1961), the Department said:

> Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals found are of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made.

There is a difference between evidence which will induce a person of ordinary prudence to spend his time and money in an effort to develop a valuable mine and the evidence which will induce him to spend his time and money for further exploration or prospecting of his claim or claims. The reports and testimony of the expert witness of the mining claimant upon which the decision below and the mining claimant rely clearly falls within the latter category of evidence and will not support a finding of discovery on any of the claims involved. Cf. Rough Rider and Other Lode Claims 41 L. D. 242 (1911).

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The fact that other mining claims in the vicinity are operating or have operated on the Homestake formation is not persuasive evidence that discoveries have been made on the Henault claims in question. If the surrounding claims have been successfully mined, this fact may raise a geological inference that there are valuable mineral deposits to be found on these claims, but such an inference, no matter how strong, cannot be substituted for a discovery of a valuable mineral deposit on each mining claim involved. United States v. C. F. Snyder et al., 72 I. D. 223 (1965). A geological inference may engender willingness on the part of a mining claimant to take the risk involved in exploration, but willingness has never been substituted for justification under the prudent man rule of discovery laid down in Castle v. Womble, 19 L. D. 455 (1894); long approved by the courts and recently reaffirmed in Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963). The most favorable finding that can be made from the evidence is that the claims involved might be a good gamble for those who can afford to take the chance. This is not sufficient. United States v. Edgecumbe Exploration Company, Inc., A-29908 (May 25, 1964).

Upon careful review of the evidence, it must be concluded that the Government clearly made a prima facie case that there was no discovery on any of the claims involved in the appeal within the requirements of the mining laws on July 23, 1955 or prior thereto and that the Government's case has not been refuted by the mining claimant.

The appellee, mining claimant, has requested that it be granted an opportunity for oral argument under the discretionary authority provided in 43 CFR 1843.6. The mining claimant has not been limited in its right to reply to the appellant's statement of reasons for the appeal, and it was allowed additional time within which to submit the answering brief it filed. Since the basis for the decision on appeal

must be the record made at the hearing, 43 CFR 1840.0-8, after careful consideration it is not believed that oral argument would be of any particular usefulness. Therefore, the request for oral argument is denied. Big Piney Oil and Gas Co., A-29895 (July 27, 1964).

Accordingly, that part of the Hearing Examiner's decision dismissing the proceedings against the Red Beard, McLaughlin, Keno, Gold Mine, Blanche B., W. S. Stratton Nos. 4 and 5, Ice Pond, Joseph, Gold Mine Fraction, Gold Mine No. 1, Bonaparte, Pearl, Carline, Rescue Bond Nos. 2 and 3 and Strawberry Nos. 1 and 2 lode mining claims is reversed and these claims are subject to the limitations and restrictions of section 4 of the act of July 23, 1955, supra.

It should be noted that this decision does not determine the validity or invalidity of the mining claims in issue. It does not preclude the mining claimant from attempting to develop the claims under the mining laws, subject to the restrictions or limitations specified in section 4 of the act of July 23, 1955, supra, which includes the right of the United States, prior to patent, to manage and dispose of the vegetative resources on lands embraced in the claims and to manage other surface resources thereof.

The Henault Mining Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all mining claims adversely affected by this decision the total filing fee will be $90. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

In the event an appeal is taken by the Henault Mining Company, the attorney for the Government who must be served is:

Field Solicitor
U.S. Department of the Interior
P. O. Box 1538
Billings, Montana

(Sgd.) JOHN B. PICCOLO

Acting Chief, Office of Appeals
and Hearings

Enclosures

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WHW

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

A–30540	: Montana 035391(SD)-B
	: Montana 037135(SD)-C
United States	
v.	: Mining claims declared
Henault Mining Company	: subject to the act of
	: July 23, 1955
	: Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Henault Mining Company has appealed to the Secretary of the Interior from a decision dated August 12, 1965, whereby the Office of Appeals and Hearings, Bureau of Land Management, reversed in part a decision of a hearing examiner declaring the Automobile lode mining claim in T. 4N., R. 3E., B.H. Mer., South Dakota, subject to the limitations and restrictions of section 4 of the act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 612 (1964), and dismissing, as to eighteen other lode claims in Ts. 4 and 5 N., R. 3 E., a proceeding initiated pursuant to section 5 of the act of July 23, 1955, 69 Stat. 369, as amended, 30 U.S.C. § 613 (1964).

On October 3, 1960, and February 18, 1961, the appellant filed verified statements claiming rights contrary to or in conflict with the limitations and restrictions of section 4 of the act of July 23, 1955, supra, as to the Red Beard, McLaughlin, Keno, Gold Mine, Gold Mine No. 1, Gold Mine Fraction, Blanche B., W. S. Stratton Nos. 4 and 5, Ice Pond,

Joseph, Bonaparte, Pearl, Carline, Rescue Bond Nos. 2 and 3, Strawberry Nos. 1 and 2, Automobile, Globe Fraction and Oscar lode mining claims. The Government recognized the rights asserted by the appellant as to the Globe Fraction and Oscar lode claims, and, by a decision dated February 23, 1962, the Montana land office accepted the verified statement of the appellant as to these claims. However, the Government requested a hearing to determine the rights of the claimant as to the other nineteen claims, and a hearing was held for that purpose at Rapid City, South Dakota, on October 22, 23 and 24, 1963.

The basic facts concerning the location, ownership, workings and surface mineralization of the claims are not in dispute. The claims were all located prior to July 23, 1955, and are presently owned by the appellant. At the hearing, both the Government and the mining claimant presented in evidence assays of numerous samples of minerals which were taken from the claims by Ernest T. Tuchek, a geologist employed by the Bureau of Land Management, and by Ernest Shepherd, a geologist working under the supervision of Lawrence B. Wright, a consulting geologist retained by the mining claimant. The samples were taken from various pits, cuts and adits on the claims during extensive examinations by the two geologists and were assayed for gold and silver values.

The Government's case was based solely upon the results of the surface examination and upon the lack of evidence disclosed by such examination of the existence of a vein or lode from which one might reasonably hope to develop a profitable mine. The appellant's case, on the other hand, was based primarily upon the testimony of Wright, who examined the appellant's claims in 1948 and in 1961 and made specific recommendations for further mineral exploration on the claims and whose deposition, taken at San Francisco, California, on October 3 and 4, 1963, was admitted in

evidence over the vigorous protest of counsel for the Government.

The hearing examiner found from the testimony that the two geologists (Tuchek and Shepherd) met occasionally during their examinations but that their work was entirely separate, that they did not necessarily sample in precisely the same places but that a comparison of the values found in their samples revealed, within the limits of human tolerance, similar results. He noted that, although the gold and silver content of the samples taken varied from trace amounts to a high of $15.87 per ton in one sample, the values found in the great majority of the samples ranged from 9 cents to less than $1.00 per ton. The examiner found this evidence to be conclusive that there are exposed within the limits of each claim, except the Automobile lode, veins or lodes of rock in place containing some amounts of gold and silver, and he found the evidence to be conclusive that there is no surface exposure of minerals on any of the claims which can be mined at a profit.

The examiner further found that all of the experts in the field of geology who appeared at the hearing testified that the land upon which the claims are situated is mineral in character, that the claims are surrounded by patented mining claims and that they lie immediately adjacent to the present working area from which the Homestake Mining Company, the largest gold producer in the United States, is extracting ore at a profit. He found that appellant's witness Wright has an intimate knowledge of the geology of the area, that he was employed by the Homestake Mining Company from 1919 to 1931, for the last six years of that period as chief geologist for the company, that he is thoroughly familiar with all of the mining and geologic technical publications on the Black Hills region and that he conducted and supervised the examination of the Henault claims which culminated in the

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1948 and 1961 reports. He then summarized Wright's conclusions as follows:

"1. That the Henault Mining Company's claim group lies within the province of major gold mineralization in the Black Hills.

2. That the claims lie adjacent to the country's greatest producer of gold which is of no significance except that the geologic structural relations are such that the proximity has real value.

3. That the geology of the Henault ground is structurally related to that of the Homestake Mining Company's ground and ore deposits in such a manner that the possibility of deep ore deposits such as are being developed by Homestake may reasonably be expected at minable depths at Henault.

4. The values in gold and silver existing in Henault ground can only lead to the conclusion that these surface expressions are 'upward leaks' effected at the time of mineralization from substantial deposits below.

5. That the tertiary dike zone through the center of the Henault claims emplaced in an anticlinal structure (believed to elevate the favorable Homestake formation closer to the surface) is additional incentive to moderately deep exploration for substantial amounts of ore.

6. That all Henault holdings are of mineral charac-

> ter and, considering that almost all surrounding grounds have been patented, are entitled to the same consideration for patent."

The examiner then noted that Wright recommended that at least three holes be drilled to a depth of 3500 to 4000 feet to probe for minerals at depth.[1/] The soundness of Wright's recommendations was attested to by Professor Edwin H. Oshier, a mining engineer and head of the Department of Mining Engineering at the South Dakota School of Mines and Technology, who had not personally examined the claims but whose opinion was based upon a review of Wright's reports and upon Wright's reputation as an authority on the geology of the northern Black Hills.

The examiner found that, although the qualifications of the Government's expert witnesses could not be questioned, neither of the two witnesses who testified in behalf of the Government had as thorough a knowledge of the geology of the area as did Wright and that, from a geologic standpoint, their examinations did not approach those of Wright in thoroughness. He, therefore, accepted the recommendations of Wright as to the possibilities for following the veins or lodes on the surface of the Henault claims as being the best available information upon which a prudent man would rely. After noting the requirements for a discovery of valuable minerals, as set forth in Castle v. Womble, 19 L.D. 455

[1/] The hearing examiner stated in his decision that "[a]t an estimated cost of $14.50 per foot the cost of such drilling would entail expenditures of $360,000 to $480,000." Wright did state that the cost of diamond drilling would be approximately $14.50 per foot (Deposition of Lawrence B. Wright, p. 61), but the source of the "$360,000 to $480,000" figures is not clear, although these figures have been cited by the appellant in its present appeal. The correct amount here is not essential to the outcome of the case, however, and it is unnecessary to resolve the apparent mathematical discrepancy.

(1894),[2] and Chrisman v. Miller, 197 U.S. 313 (1905) and for a lode claim in particular, as set forth in Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912),[3] the examiner stated that, while it is true that the courts and the Department of the Interior have never accepted geological inference standing alone, however strong, as a substitute for an actual exposure of valuable mineral sufficient to constitute a discovery, such evidence is of prime importance in determining whether or not values exposed in veins or lodes, if followed, could reasonably be expected to lead to greater values at depth. He then cited language from the Jefferson-Montana Copper Mines Co. decision, supra, to the effect that:

> "It is clear that many factors may enter into the third element: The size of the vein, as far as disclosed, the quality and quantity of mineral it carries, its proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts, would all be considered by a prudent man in determining whether the vein or

[2] "[W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met." 19 L. D. at 457.

[3] "1. There must be a vein or lode of quartz or other rock in place;
2. The quartz or other rock in place must carry gold or some other valuable mineral deposit;
3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine."

lode he has discovered warrants a further expenditure or not." 41 L.D. at 323-324.

The hearing examiner then found that it had been established that on each of the claims, except the Automobile, there are veins of rock in place containing valuable minerals and that, although most of the assays revealed nominal or very low values which could not in any sense be considered worthwhile to mine, the mineralization was there, and, in view of the favorable geology of the area, he concluded that there had been a discovery on each of those claims. He acknowledged that his conclusion rested squarely on the acceptance of Wright's recommendations. With respect to the Automobile claim, he found that neither party had found or sampled any structures on the claim, that there were no pits or evidence of prospecting on the claim, and that the prima facie showing of lack of discovery had not been rebutted. That claim, accordingly, was declared subject to the restrictions and limitations of section 4 of the act, supra.

The United States, acting through the Montana State Director, Bureau of Land Management, appealed to the Director, Bureau of Land Management, from the hearing examiner's decision as to the eighteen claims on which the examiner found that there had been a discovery, and, by its decision of August 12, 1965, the Office of Appeals and Hearings reversed the hearing examiner's decision as to those claims upon a finding that the evidence and testimony of the mining claimant's experienced witness did not establish as an existing fact that the Homestake formation underlies the Henault claims and that the evidence at most, indicates that the claims warrant further exploration to determine whether the Homestake formation is under the claims and whether it is sufficiently mineralized.

In reaching its conclusions, the Office of Appeals and Hearings held that the mining claimant has the burden of establishing by a preponderance of the evidence that there is a discovery within the limits of each claim (Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959)), that the mere hope or expectation, based upon a general belief, that values will increase at depth is not sufficient to establish a valid discovery (United States v. Duvall and Russell, 65 I.D. 458 (1958)), that there is a difference between the evidence which will induce a person of ordinary prudence to spend his time and money in an effort to develop a valuable mine and the evidence which will induce him to spend his time and money for further exploration, and that the reports and testimony upon which the mining claimant and the hearing examiner relied were clearly of the latter category. It concluded that the evidence presented in the hearing did no more than to raise a geological inference that there are valuable mineral deposits to be found on the claims, that this inference may engender willingness on the part of a mining claimant to take the risk involved in further exploration, but that these factors, no matter how strong, do not constitute, and cannot be substituted for, a discovery, citing United States v. Edgecumbe Exploration Company, Inc., A-29908 (May 25, 1964), and United States v. C.F. Snyder et al., 72 I.D. 223 (1965).

The Office of Appeals and Hearings also held that the hearing examiner's decision had become final as to the Automobile claim, since the mining claimant did not appeal from the ruling, and it denied the claimant's request for oral argument.

In its present appeal the appellant contends, in substance, that:

(1) The mining claimant's evidence fully satisfies the requirements of a discovery as set forth in Castle v. Womble, supra, and in Jefferson-Montana Copper Mines Co., supra;

(2) The Bureau applied a different test from the accepted standard, requiring the claimant to show that a prudent man would be warranted in the expenditure of his time and money "in developing a valuable mine", whereas the proper showing would be that such a man would be warranted in the expenditure of time and money in the effort to develop a valuable mine", and

(3) The hearing examiner and the Office of Appeals and Hearings erred in finding immaterial appellant's proposed findings that the land upon which the claims are located contains no timber of commercial value, is not usable for grazing or recreational purposes, and is not contemplated to be used for building sites, that the claims were located and are held in good faith for the purpose of acquiring the land because of its mineral deposits, and that the mining claimant is convinced that further expenditure of time and effort can reasonably be expected to develop a valuable mine on the claims and has substantiated this belief by the expenditure of at least $57,000.00 in assessment work on the claims since 1945. The appellant has also renewed its request for oral argument.

There is essentially no dispute as to the facts of this case. It has not at any time been suggested that a workable mineral deposit has been uncovered on any of the claims in question or that any exposed area on the claims is a part of a vein or lode which, in itself, appears to contain values which would warrant efforts to develop a valuable mine. On the other hand, no effort was made by the Government to challenge

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the validity of the findings or the recommendations of appellant's witness Wright. Only the legal effect of his findings is challenged, and the sole issue in this appeal is whether those findings, considered alone or with the established facts of the case, are sufficient to constitute a discovery under the mining laws.

Stated briefly, it is our view that the decision of the Office of Appeals and Hearings is consistent with the Department's interpretation of the law of discovery and that the views advocated by the appellant, and accepted by the hearing examiner, are not.

The basic problem in this case is that the appellant has failed to distinguish between "exploration" and "development" and that it has ignored the long-recognized requirement that the vein or lode upon which a discovery is based must be exposed within the limits of each claim.

As the Bureau has pointed out, the Department recognizes a distinct difference between "exploration" and "development" as they relate to "discovery" under the mining laws. Exploration work is that which is done prior to discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found, it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235 (1961); United States v. Edgecumbe Exploration Company, Inc., supra; United States v. Ford M.

Converse, 72 I.D. 141 (1965).[4/]

This is not an artificial or arbitrary distinction fabricated by the Department. It is simply a recognition that these separate stages of mining activity do exist and that there is a significant difference in their meaning insofar as they may influence further mining effort. Moreover, the distinction between these terms was clearly recognized by the appellant's witness Wright, as illustrated by the following excerpt from his testimony:

> "Q [by Mr. Carrell, counsel for claimant]. Would you please state what your understanding of those terms [development, exploration and mining] and their inter-relationship is in connection with this field and this particular proceeding.
>
> A. Well, taking them in a little different order than you just recited them, it is a customary practice in the mining business, particularly where new ventures are concerned, to first make an examination, and, if the results of the examination justify, then some exploration steps are usually recommended of one kind or another. They might, the exploration might consist of sinking an exploratory vertical shaft or, if it is a very mountainous country, driving an adit into the mountain, or it might consist of doing nothing more than, in the beginning, than diamond drilling to test possibilities with depth. This is exploration.

[4/] The Converse decision has been challenged in Converse v. Udall, Civil No. 65-581 in the United States District Court for the District of Oregon.

> Now then, if the results of the exploration justify a further larger expenditure, then you begin to develop the property by expanding your underground work or, if it is an open pit mine, by starting an open pit, for example. Then as your development reaches an adequate stage, your exploitation or mining or production of the material being sought is the last stage.
>
> Q. In connection with the examination of the properties did you recommend that any diamond drilling be done on the Henault Group?
>
> A. I did. I felt that the entire situation, the geologic environment and the surface showings justified a step of exploration and along those lines I recommended a limited diamond drilling program and I outlined approximately where I thought the drilling should take place on the properties." Wright deposition, pp. 47-48.

The appellant suggests that the Bureau has required the actual development of a valuable mine with proven ability to produce at a profit. This is not so. It is only after the fourth stage listed, "exploitation", has been entered that it can be determined with any degree of finality whether or not a mine will be economically successful. The Department has not required that this, or even the third stage, the development, be initiated in order to establish a discovery. The substance of the cited decisions is that the second stage of a mining venture, the exploration, must have satisfactorily progressed to the point at which the further expenditure of money and effort for the third phase may be favorably contemplated. The appellant, however, has accomplished only the first of

the four steps enumerated by Wright and appears now to be on the threshold of entering the second phase, and the recommendations go only to the taking of the second step, the witness having expressly refrained from making recommendations beyond that step until the results of the recommended exploration could be ascertained. See Wright deposition, pp. 67-68. Had the appellant's expert witness recommended the sinking of a shaft and the driving of levels at any point in the claims, we would be faced with an entirely different question, but the witness did not make that recommendation, and, until the recommended exploratory steps are taken, there would appear to be no basis for determining whether a prudent man would be justified in expending money and effort with a reasonable expectation of developing a profitable mine.

In the Converse case, supra, we considered the apparent inconsistency of the Department's distinction between "exploration" and "development" and the court's determination in Charlton v. Kelly, 15 Fed. 433 (9th Cir. 1907), cited by the appellant here, that the terms mean the same things, and we concluded that there was, in fact, no real inconsistency, for a different standard has long been employed when determining priority of right between conflicting mining claimants than is employed in determining whether lands should be taken from the jurisdiction of the United States. See 72 I.D. 149-150. The standard applied by the Bureau in the present case is the same as that which was applied in the Converse case and which we find to be proper in this instance.

Factually, appellant's claim of a discovery is based on the following: The mineral values in the area are found in the Homestake formation which has been extensively mined for gold by the Homestake Mining Company on adjoining property. The Homestake formation dips toward appellant's

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claims and outcrops at some distance beyond the claims. Because of this Wright testified that he believed that the formation extends beneath the Henault claims. The formation does not outcrop on the claims but a number of Tertiary dikes do. These dikes are believed to originate below the Homestake formation and to penetrate that formation on their way to the surface. The slight mineral values found in the dikes by the extensive sampling are believed to represent leaks from the minerals in the Homestake formation. However, the really valuable mineral deposits are expected to be found at the intersections of the dikes with the Homestake formation and it is to establish this that Wright recommended the drilling of three holes to depths of 3500 to 4000 feet. Wright deposition, pp. 50-59.

There is no contention that the Homestake formation has actually been exposed on any of the Henault claims. There is also no contention that the Tertiary dikes or intrusions carry valuable mineral deposits. They are claimed merely to establish that the Homestake formation, which is believed to carry the valuable deposits, lies below the surface, possibly a few thousand feet down.

In East Tintic Consolidated Mining Claim, 40 L.D. 271, 273 (1911), the Department stated that:

> "It is evident from the record before the Department that the deposits alleged to have been exposed on these claims are regarded by the applicant as possessing practically no economic value, but that, on the other hand, title to the claims is sought essentially on account of their possible value for certain unexposed deposits supposed to exist at considerable depth beneath the surface, and having no connection, so far as shown, with any deposits appearing on the surface.

> The exposure, however, of substantially worthless deposits on the surface of a claim; the finding of mere surface indications of mineral within its limits; the discovery of valuable mineral deposits outside the claim; or deductions from established geological facts relating to it; one or all of which matters may reasonably give rise to a hope or belief, however strong it may be, that a valuable mineral deposit exists within the claim, will neither suffice as a discovery thereon, nor be entitled to be accepted as the equivalent thereof. To constitute a valid discovery upon a claim for which patent is sought there must be actually and physically exposed within the limits thereof a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes* * *."

In subsequent consideration of the same matter the Department stated:

> "* * * Reading this petition in connection with the prior decision of the Department (40 L.D., 271) makes it evident that patent for these claims is being sought for the purpose of developing supposed deposits of ore – which we may call lodes – well below the surface of the ground, and that there is no claim that the deposits which it is intended to develop have been in fact discovered. The so-called discoveries on the surface of the various claims are supposed to indicate that other unconnected veins or lodes lie at a greater depth. In other words, in these cases there is an apparent attempt to substitute observation, combined with

geologic inference, for discovery. Whatever may be thought of its policy Congress has said in section 2320 of the Revised Statutes: 'but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.' Obviously, the words 'the [emphasis in original] vein or lode' can only refer to the lode which it expected to develop and mine and cannot refer to disconnected bodies of ore of no possible value in themselves. Congress having laid down this rule for the guidance of the Department, the Department can do nothing but follow the will of Congress in this particular. If the rule is in general, as has been insisted, too narrow a one, or if it does not fit particular localities, obviously the remedy is to be sought at the hands of Congress; and it would be usurpation of authority in this Department to attempt to amend, directly or indirectly, the unmistakable language of the statute.

"The question whether before patenting of a lode claim ore must be exposed of commercial value * * * is manifestly not in point. Any question as to the character of the vein or lode can only arise after the vein or lode on account of which patent is desired has been discovered." East Tintic Consolidated Mining Co. (on rehearing), 41 L.D. 255 (1912); emphasis added except as indicated.

The principle enunciated here has been frequently repeated by the Department (see, e.g., Rough Rider and Other Lode Claims, 41 L.D. 242 (1911); United States v. Edgecumbe Exploration Company, Inc., supra; United States v. C. F. Snyder et al., supra), and, in spite of the appellant's efforts

to distinguish this case from those cited, we find the evidence here to be essentially of the kind that the Department has consistently refused to accept as the equivalent of a discovery. It is, perhaps, true that the inferences arising from the circumstances of this case, i.e., the location of the claims in an established mining district, surrounded by patented claims, the proximity to the nation's leading gold-producing mine, and the testimony of acknowledged authorities as to the geological formations of the area, are stronger than in most cases in which the Department has refused to accept these inferences. However, it is the nature of the evidence and not its strength which is the determining criterion.

The fact is that the assumed existence of the Homestake formation below the claims and the assumed existence of valuable gold or silver deposits in the formation assumed to exist are based on geologic inference. The fact too is that the existence of the formation in the claims and the existence of valuable minerals in the formation are not such a certainty that a prudent man would be justified in driving shafts with a view to the commencement of mining operations. All that Wright has recommended is further exploration by drilling test holes to determine if the Homestake formation underlies the claims and if it contains the mineral values he expects. The recommended drilling program is not inexpensive. There would be no point in undertaking it if the existence of the valuable Homestake formation in the claims were the certainty that appellant claims.

At this point we may note that appellant's reliance upon the language quoted earlier in the text from Jefferson-Montana Copper Mines Co., supra, is misplaced. This is the language to the effect that in determining whether the vein or lode he has discovered would warrant further expenditure, a prudent man would consider "[t]he size of the vein, as far as disclosed, the quality and quantity of mineral it carries, its

proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts * * *." This language clearly refers only to the vein or lode which has been discovered and "disclosed" and sets forth the factors for determining whether that vein or lode contains mineral values worth exploiting. In the case here, the only veins or lodes which have been exposed on the claims are the Tertiary dikes or intrusions which are not claimed to be source of valuable mineralization. The discovery upon which the appellant relies is of the Homestake formation which has not been exposed on the claims.

We think that the evidence clearly establishes that a discovery, as that term is understood and used by the Department, and as it is used by those in the mining profession at least part of the time, has not been shown on any of the claims in question.

The remaining contentions of the appellant have been considered, and we concur with the Bureau that the issues raised are immaterial to the question of discovery and, therefore, immaterial to the outcome of this case. With respect to the request for oral argument, the appellant has not shown that such argument would bring to light any material facts which it has not already presented or had an opportunity to present or that it would serve any useful purpose, and the request is hereby denied.

As the Bureau has already pointed out, the determination here need not prevent further efforts by the appellant to explore and develop the mineral deposits which may be found within the limits of its claims. The appellant is free to undertake the drilling program recommended by Wright. As long as the land remains open to the operation of the mining laws, the claimant is protected in its right to such deposits as

may be found, but until a patent is issued, its use of the land embraced by the claims is limited to mining and other uses of the land incidental to mining.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

(Sgd.) ERNEST F. HOM

Ernest F. Hom
Assistant Solicitor
Land Appeals

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

HENAULT MINING COMPANY,	:	
Plaintiff,	:	Civil No. 634
v.	:	ORDER
HAROLD TYSK, individually and as Montana State Director of the Bureau of Land Management, and STUART L. UDALL, individually and as Secretary of the Interior,	:	and
	:	MEMORANDUM OPINION
Defendants.	:	

This is an action for a declaratory judgment[1] determining the validity of 18 mining claims owned by plaintiff and for review of a decision of the Secretary of the Interior under the Administrative Procedures Act.[2] Both sides have moved for

[1] Federal Declaratory Judgment Act, 28 U.S.C.A. 2201 et seq.

[2] 5 U.S.C. 1001-1009. Section 1009(a) provides: "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

summary judgment.[3]

In 1960 defendant Montana State Director of the Bureau of Land Management instituted a proceeding, authorized by the Act of July 23, 1955 (commonly called the Multiple Surface Uses Act) 30 U.S.C. Secs. 612 and 613, against a group of 21 contiguous lode mining claims which were located and held by the mining claimant (plaintiff) for many years prior to the enactment of the Act. The purpose of the proceeding was to determine the right of the Montana State Director to manage and dispose of the vegetative surface resources and to manage other surface resources (except mineral deposits subject to location under the mining laws of the United States). 30 U.S.C. 612(b).

On all claims located prior to the enactment of the Multiple Surface Uses Act, the Bureau of Land Management must establish the invalidity of those locations in order to subject the land to the Act's reservation of surface resources.[4] The Director attempted to do so by alleging in his proceedings that the locations were invalid for lack of "discovery" required under the mining laws of the United States. 30 U.S.C. Sec. 23.

A decision was entered by a hearing examiner on July 10, 1964, holding that there was a "discovery" under the mining laws of the United States and dismissing the Director's

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[3] Summary judgment is a proper remedy in judicial review of an agency decision, where only a question of law is presented. Dredge Corporation v. Penny, 9 Cir. 1964, 338 F.2d 456.

[4] When the Government contests the validity of a mining claim, it has the burden of going forward with sufficient evidence to establish a prima facie case. Thereafter the burden shifts to the claimant to show by a preponderance of the evidence that his claim is valid. Foster v. Seaton, 1959, 106 U.S. App. D.C. 253, 271 F.2d 836, 838; United States v. Toole, D. Mont. 1963, 224 F.Supp. 441, 445.

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proceedings as to 18 claims. [5] This decision was reversed by the Acting Chief, Office of Appeals and Hearings, on August 12, 1965, on the ground that the examiner's decision was based on geological inferences and not on facts. This reversal was affirmed by the Secretary of the Interior on June 15, 1966.

The primary issue before the Secretary upon appeal was whether the findings of the hearing examiner were sufficient to constitute a discovery under mining laws. A secondary issue was whether the mining claimant's (plaintiff) proposed findings of fact, 10, 11 and 12 were material and should have been granted by the examiner.

The Secretary held that, "The evidence clearly establishes that a discovery, as that term is understood and used by the Department, . . . has not been shown on any claims in question," and that proposed findings 10, 11 and 12 are "immaterial to the question of discovery and therefore immaterial to the outcome of this case."

The issue here presented is whether the agency action, findings, and conclusions contained in the Secretary's decision were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. 1009 (e)(B)(1). The scope of inquiry and judicial review granted this court by the Administrative Procedure Act includes the power and authority to decide all the relevant questions of law and to interpret the statutory provisions involved in the

[5] The Government recognized the validity of two of the 21 claims. The hearing examiner held one claim invalid, and no appeal was taken from his decision.

decision of the Secretary. 5 U.S.C. Sec. 1009.[6]

In order to validate a mining claim under the mining laws of the United States there must be a discovery of a valuable mineral deposit within the limits of the claim. 30 U.S.C. § 23, 25. The rules for determining whether the necessary discovery has been made were well summarized by the Court of Appeals for the Ninth Circuit in the recent case of Coleman v. United States, 1966, 363 F.2d 190, where the court reversed a summary judgment entered by the district court in favor of the Government upholding the decisions of the hearing examiner, Acting Director of the Bureau of Land Management, and Secretary of the Interior.[7] The court said in part:

> "The basic test used to determine whether such discovery has been made was stated by the Department in Castle v. Womble, 1894, 19 I.D. 455, 457, to be that:
>
> > "Where minerals have been found and the evidence is of such character that a person of ordinary prudence would be justified in further expenditures of his labor and means

[6] It is recognized that the court may not weigh evidence adduced in an administrative proceeding, and if, upon review of the entire record, there is found substantial evidence to support the Secretary's decision, it must be affirmed. Henrikson v. Udall, 9 Cir. 1965, 350 F.2d 949. All parties agree, however, that there is no genuine issue of fact and accept the findings of the hearing examiner.

[7] The United States petitioned for a rehearing. An order was entered joining the Secretary of the Interior as a counter-claim defendant and appellee, and a rehearing was granted. Following briefs and oral argument, an order was entered June 20, 1967, reading in pertinent part: "After thorough reconsideration of the issues involved and the arguments of the imposing parties, the Court adheres to and confirms the opinion and decision filed June 21, 1966."

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with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.'

This standard has been judicially approved. Chrisman v. Miller, 197 U.S. 313, 25 S.Ct. 468, 49 L.Ed. 770; Cameron v. United States, 1920, 252 U.S. 450, 40 S.Ct. 410, 64 L.Ed. 659; Best v. Humbolt Mining Co., 1963, 371 U.S. 334, 83 S.Ct. 379, 9 L.Ed.2d 350." (at p. 196-197).

"* * *

"The applicable criteria of presence of a valuable mineral in each of the claims is whether a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine." (at p. 203).[8]

Factors to be considered in applying the "prudent man" test with respect to a lode claim were set forth in Jefferson-Montana Copper Mines, 1912, 41 L.D. 320, as follows:

"1. There must be a vein or lode of quartz or other rock in place;

"2. The quartz or other rock in place must carry gold or some other valuable mineral deposit;

"3. The two preceding elements when taken

[8] See also United States v. Toole, supra, and cases there cited.

> together must be such as to warrant a prudent man in the effort to develop a valuable mine.
>
> "It is clear that many factors may enter into the third element: the size of the vein as far as disclosed, the quality and quantity of mineral it carries, its proximity to working mines and location in an established mining district, the geologic conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts, would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not."

The findings of the hearing examiner were fairly summarized in the decision of the Secretary. After referring to the examiner's finding that a comparison of the values of the samples taken by the geologists for both the Government and the claimant "revealed, within the limits of human tolerance, similar results", the decision of the Secretary continued:

> "* * * He (the examiner) noted that, although the gold and silver content of the samples taken varied from trace amounts to a high of $15.87 per ton in one sample, the values found in the great majority of the samples ranged from 9 cents to less than $1.00 per ton. The examiner found this evidence to be conclusive that there are exposed within the limits of each claim, (* * *) veins or lodes of rock in place containing some amounts of gold and silver, and he found the evidence to be conclusive that there is no surface exposure of minerals on any of the claims which can be mined at a profit.

"The examiner further found that all of the experts in the field of geology who appeared at the hearing testified that the land upon which the claims are situated is mineral in character, that the claims are surrounded by patented mining claims and that they lie immediately adjacent to the present working area from which the Homestake Mining Company, the largest gold producer in the United States, is extracting ore at a profit. He found that appellant's witness Wright has an intimate knowledge of the geology of the area, that he was employed by the Homestake Mining Company from 1919 to 1931, for the last six years of that period as chief geologist for the company, that he is thoroughly familiar with all of the mining and geologic technical publications on the Black Hills region and that he conducted and supervised the examination of the Henault claims which culminated in the 1948 and 1961 reports. He then summarized Wright's conclusions as follows:

'1. That the Henault Mining Company's claim group lies within the province of major gold mineralization in the Black Hills.

2. That the claims lie adjacent to the country's greatest producer of gold which is of no significance except that the geologic structural relation are such that the proximity has real value.

3. That the geology of the Henault ground is structurally related to that of the Homestake Mining Company's ground and ore deposits in

such a manner that the possibility of deep ore deposits such as are being developed by Homestake may reasonably be expected at minable depths at Henault.

4. The values in gold and silver existing in Henault ground can only lead to the conclusion that these surface expressions are "upward leaks" effected at the time of mineralization from substantial deposits below.

5. That the tertiary dike zone through the center of the Henault claims emplaced in an anticlinal structure (believed to elevate the favorable Homestake formation closer to the surface) is additional incentive to moderately deep exploration for substantial amounts of ore.

6. That all Henault holdings are of mineral character and, considering that almost all surrounding grounds have been patented, are entitled to the same consideration for patent.'

"The examiner then noted that Wright recommended that at least three holes be drilled to a depth of 3500 to 4000 feet to probe for minerals at depth. The soundness of Wright's recommendations was attested to by Professor Edwin H. Oshier, a mining engineer and head of the Department of Mining Engineering at the South Dakota School of Mines and Technology, who had not personally examined the claims but whose opinion

was based upon a review of Wright's reports and upon Wright's reputation as an authority on the geology of the northern Black Hills.

"The examiner found that, although the qualifications of the Government's expert witnesses could not be questioned, neither of the two witnesses who testified in behalf of the Government had as thorough a knowledge of the geology of the area as did Wright and that, from a geologic standpoint, their examinations did not approach those of Wright in thoroughness. He, therefore, accepted the recommendations of Wright as to the possibilities for following the veins or lodes on the surface of the Henault claims as being the best available information upon which a prudent man would rely."

Simply stated, we have this situation: There has been exposed within the lands of each claim a vein of rock in place containing gold and silver, although there is no surface exposure which can be mined at a profit. The claims are adjacent to the largest gold producing claims in the world. The best qualified geologist for the area concluded that the values in gold and silver existing on the ground can only lead to the conclusion that the surface expressions are "upward leaks" effected at the time of mineralization from substantial deposits below. On the basis of his findings and conclusions he recommends the expediture of a substantial sum of money in drilling holes to probe for minerals at depth.[9] Do the

[9] The Examiner found that at an estimated cost of $14.50 per foot the drilling would entail expenditures of $360,000.00 to $480,000.00. The Secretary, apparently with good reason, questions the mathematical accuracy of the totals, but there is no doubt the amount is substantial.

findings, conclusions and recommendations of the witness Wright support the examiner's conclusion that there was a "discovery"?[10]

The examiner recognized, as does the court, that "geological inference" standing alone may not be accepted as a substitute for discovery, but concluded that such evidence "is of prime importance in determining whether or not values exposed in veins or lodes, if followed, could reasonably be expected to lead to greater values at depth." He concluded further, and in my opinion correctly, that "evidence as to the geology of the region, the proximity of the claims to working mines, the economics of mining, and any other fact or circumstance which might possibly affect the success of a mining venture, would necessarily be considered by a prudent man in determining whether or not he would expend further time and money in following the veins or lodes exposed, and is relevant evidence."[11]

I agree also with the examiner's conclusion that "If, in the face of the evidence presented, it were held that no discovery had been made it would be tantamount to holding that no

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[10] According to the Secretary, the Government does not challenge the validity of Wright's findings and recommendations but only the legal effect of his findings, stating that the "sole issue in this appeal is whether those findings, considered alone or with the established facts of the case, are sufficient to constitute a discovery under the mining laws."

[11] The decision of the Secretary recognizes that the inferences arising from the circumstances of this case "are stronger than in most cases in which the Department has refused to accept these inferences", but holds that "it is the nature of the evidence and not its strength which is the determining criterion".

discovery exists until paying ore is exposed. This is not the law."[12]

In two recent cases in the District of Colorado, Snyder v. Udall, decided April 18, 1967, and Garula v. Udall, decided April 26, 1967, Judge Chilson, in setting aside decisions of the hearing examiners, Bureau of Land Management, and Secretary of the Interior, held that they were based on an erroneous legal theory and in effect required discovery of ore of commerical value to validate a mining claim. Judge Chilson quoted with approval the following excerpts from American Law of Mining:

> "It has frequently been stated that discovery in order to be valid need not be of ore in commercial quantities or of quantity and quality which will yield a profit." (Vol I, § 4.26, pg. 642).
>
> "If the miner were required to demonstrate commercial value at the time he makes his initial discovery, the intent of the mining laws would be totally frustrated; and the value requirement contained in the prudent man test thus seems to represent a reasonable tempering of the statutory value requirement to the very real problems facing the discovered and locator who goes upon the ground to stake his claim." (Vol I, § 4.26, pg. 643).

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[12] An additional test of marketability has been imposed by the Department with respect to widespread nonmetallic minerals, such as sand and gravel. In Coleman v. United States, supra, the court held that it was not necessary to show marketability in a claim for building stone; that no distinction should be made between a placer claim for gold and a placer claim for building stone with respect to proof of a valuable mineral; and "that the prudent man's test of Castle v. Womble should suffice for either". (363 F.2d at 202).

> "Although the Land Department still recognizes the prudent man test and has stated that it is not necessary to show values which will demonstrate that a 'claim can be worked at a profit or that it is more probable than not that a profitable mine operation can be brought about,' at least in cases involving minerals having intrinsic value, the recent decisions of the Land Department indicate that it has adopted a very strict view of discovery, and is quite close to requiring a showing of commerical value even in cases not involving common varieties of mineral." (Vol I, § 4.26, pg. 645).

In my opinion the Government has in effect required "a showing of commercial value" in this case. This is apparent from a reading of the transcript, particularly the testimony of the Government's geologist, who testified that on the claims in question the quartz or other rock in place does not carry gold or some other thing of value as a mineral deposit. He conceded discovery on two other claims by reason of the high mineralization.[13] The emphasis placed on the question of whether the "minerals exposed" would "stand the cost" of operating at a "commercial profit" is illustrated by the following excerpt from the examination of the Government geologist:

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[13] On the other hand, the witness Wright testified, "The fact that the values are low at the surface does not or cannot be ruled out as not being important in a situation such as we have here at Henault where there is other evidence of mineralization like hydrothermal alteration, zones that are mineralized with some quartz, pyrite and, maybe, $2 or $3, $5 a ton in gold in some instances." (P.67, Tr. Testimony of Lawrence B. Wright).

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"Q (By Mr. Allan) To the best of your knowledge, was there any mineral exposed in any of these claims which would stand the cost of mining, transportation, and reduction at a commercial profit?

"MR. CARRELL: That is objected to on the ground that he answered that question and not material to the issues involved in this particular hearing.

"HEARING EXAMINER RAMPTON: It is not necessary to have a paying mine at the present time, and I am sure that Mr. Allan is aware of that. Do you have any -- do you wish to state your purpose for asking that question?

"MR. ALLAN: Well, I am just laying the foundation here to show that there is no mineral exposed, is what my question was, which would stand the cost of mining transportation or reduction at a commercial profit.

"HEARING EXAMINER RAMPTON: And yet that is not the question we are called to determine here, to whether or not there is a paying mine at the present time.

"MR. ALLAN: I am asking whether or not there is a mineral exposed which would stand the cost of mining transportation and reduction at a commercial profit.

"HEARING EXAMINER RAMPTON: As a

> basis for laying a foundation, I don't think the question is objectionable, and with the understanding, of course, that I cannot make a ruling that the claims are invalid because they don't have paying or exposed -- I am going to allow the witness to answer.
>
> "THE WITNESS: No." (Tr. pp. 44-46).

In my opinion the examiner correctly concluded that "there is an exposure of valuable mineralization sufficient to satisfy the requirements of the mining law as to discovery."

The Secretary draws a sharp distinction between "exploration" and "development".[14] The relationship between exploration and development with respect to discovery was considered by the Court of Appeals for the Ninth Circuit in two cases--Lange v. Robinson, 1906, 148 Fed. 799, and Charlton v. Kelly, 1907, 156 Fed. 432.

In the Lange case, the court said in pertinent part:

> "* * * The question (of discovery) must be decided, not only with reference to the gold actually found within the limits of the claim

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[14] The Secretary's decision reads in pertinent part: "Exploration work is that which is done prior to discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found, it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made." This statement was quoted with approval in Converse v. Udall, D. Ore. 1966, 262 F.Supp. 583, 595. This case is now pending on appeal.

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located, but also in view of its situation with reference to other lands known to contain valuable deposits of placer gold, and whether its rock and soil formation are such as is usually found where these deposits exist in paying quantities * * *.

"* * * There was an actual discovery of gold upon each of the claims located. They are situated near other lands presenting the same surface indications, which at the date of the location of these claims were known to be valuable for the placer gold which they contained; and these facts, according to the uncontradicted testimony of the plaintiff and that of the witness Field, above quoted, were sufficient to justify the expenditure of money for the purpose of their exploration, with the reasonable expectation that, when developed, they would be found valuable as placer mining claims. This was in our opinion all that was necessary." (At 804).

The same rule was followed in Charlton in approving an instruction given by the trial court which used the term "development". The court said in part:

"It is argued that a discovery sufficient to justify the expenditure of time and money in the development of a mining claim must necessarily be greater than that which is necessary to justify the expenditure of money for the purpose of exploration, with the reasonable expectation that, when developed, the claim will be found valuable as a placer mining claim. Counsel for the plaintiffs in error have

assumed for the word 'development' a broader meaning than was intended in the charge."[15]

The Secretary recognizes that the "recommended drilling program is not inexpensive", but concludes that "until the recommended exploratory steps are taken, there would appear to be no basis for determining whether a prudent man would be justified in expending money and effort with the reasonable expectation of developing a profitable mine". This goes beyond the test in Castle v. Womble as set forth in decisions of the Supreme Court and the Court of Appeals for the Ninth circuit. For example, in Cameron v. United States, supra, the Court held that the Secretary correctly proceeded upon the theory "that to support a mining location a discovery should be such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine". [16] The facts here established, accepted as true by the Secretary, would clearly justify the expenditure recommended by the witness Wright (whether it be termed "exploration" or "development") by a prudent man "in an effort to develop a paying mine" and "with the reasonable prospect of success in developing a valuable mine".

It is the conclusion of the court that the State Director did not make a prima facie case of "no discovery" and that the

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[15] The Secretary and counsel for defendants distinguish Lange and Charlton on the ground that they involved disputes between rival locators. It is true that the rule respecting the sufficiency of a mineral deposit is more liberal in a contest between two claimants and less evidence of discovery is accepted, but I do not believe the rule set forth in Lange and Charlton may be disregarded on this basis.

[16] See also Coleman v. United States, supra; Lange v. Robinson, supra; Charlton v. Kelly, supra.

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decision of the Secretary of the Interior invalidating the claims was based on an erroneous legal theory and is not in accordance with law. [17]

In view of my conclusion that the hearing examiner was correct in his conclusion that there was a valid discovery with respect to each of the 18 claims, it is unnecessary to consider plaintiff's contention that its proposed findings 10, 11 and 12 should have been adopted by the examiner.

The motion of the defendants for summary judgment is denied. The motion of plaintiff is granted, except as to the proposed findings. Pursuant to Rule 11(b) of the local rules of court, plaintiff will prepare, serve and lodge a judgment consistent with this opinion.

Done and dated this 24th day of July, 1967.

W. J. Jameson
United States District Judge

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[17] Plaintiff concedes that the "examiner is a subordinate whose findings do not have the weight of the findings of a district judge", and his decision may be disregarded by the Secretary. 2 Davis, Administrative Law Treatise, Sec. 10.04, p. 26. As noted supra, however, the Secretary in effect has accepted the findings of the examiner, and the two motions for summary judgment present the legal question of whether under these findings the decision of the Secretary was proper.

LODGED August 10, 1967
John J. Parker, Clerk
By Mary C. Tuttle, Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

HENAULT MINING COMPANY, Plaintiff,	:	
v.	:	
HAROLD TYSK, individually and as Montana State Director of the Bureau of Land Management, and STUART L. UDALL, individually and as Secretary of the Interior, Defendants.	:	Civil No. 634 JUDGMENT

This Court having made, entered and filed herein its Order And Memorandum Opinion wherein it granted the Plaintiff's motion for summary judgment and denied the Defendants' cross motion for summary judgment; and it appearing that there is no issue as to any material fact and that plaintiff is entitled to judgment herein as a matter of law;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff's motion for summary judgment be, and the same hereby is granted in that:

1. It is Ordered, Adjudged and Decreed that there is a valid discovery under the applicable mining laws upon and within each and every one of the eighteen lode mining claims involved in these proceedings as described in the decision of the Hearing Examiner herein dated July 10, 1964.

2. It is Ordered, Adjudged and Decreed that the Red Beard, McLaughlin, Keno, Gold Mine, Blanche B., W. S. Stratton Nos. 4 and 5, Ice Pond, Joseph, Gold Mine Fraction, Gold Mine No. 1, Bonaparte, Pearl, Carline, Rescue Bond Nos. 2 and 3, Strawberry Nos. 1 and 2, lode mining claims, situate in Lawrence County, South Dakota, are valid mining claims under the mining laws of the United States.

3. It is Ordered, Adjudged and Decreed that the decision of the Secretary of Interior herein reviewed is based upon an erroneous legal theory and is not in accordance with law and, under the circumstances related, is arbitrary, capricious and an abuse of discretion, and is hereby reversed.

4. It is further Ordered, Adjudged and Decreed that the decision of the Hearing Examiner herein dated July 10, 1964, is fully supported by the findings therein and the law applicable thereto, and properly should have been affirmed by the Secretary of Interior in the appeal to the latter.

5. It is further Ordered, Adjudged and Decreed that this case be and the same is hereby remanded to the Secretary of Interior for further proceedings and decision in accordance with the principles, conclusions and dictates set forth

in the Order and Memorandum Opinion of this Court entered and filed herein July 24, 1967.

Done and dated this 28th day of August, 1967.

BY THE COURT:

(Signed) W. J. JAMESON
United States District Judge

Filed August 28, 1967
JOHN J. PARKER, Clerk
By Mary C. Tuttle, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HENAULT MINING COMPANY,
Plaintiff-Appellee,

vs.

HAROLD TYSK, individually and as Montana State director of the Bureau of Land Management, and STEWART L. UDALL, individually and as Secretary of the Interior,
Defendants-Appellants.

No. 22,545

[November 14, 1969]

On Appeal from the United States District Court
for the District of Montana

Before: BARNES and MERRILL, Circuit Judges, and TAYLOR, District Judge*

MERRILL, Circuit Judge:

Henault Mining Company seeks a declaratory judgment establishing the validity of 18 mining claims and for a review, under the Administrative Procedure Act, 5 U.S.C. §§ 1001-1009, of an adverse decision of the Secretary of the

*Honorable Fred M. Taylor, Chief United States District Judge for the District of Idaho, sitting by designation.

Interior. The history of the proceedings is set forth in the margin. [1]

The sole question here presented is whether, as the Government contends, the District Court erred in its determination that the locations of the claims in question were based upon valid discoveries within the meaning of 30 U.S.C. § 23. The pertinent facts are set forth in the opinion of the Secretary as follows:

> Factually [Henault's] claim of a discovery is based on the following: The mineral values in the area are found in the Homestake formation which has been extensively mined for gold by the Homestake Mining Company on adjoining property. The Homestake formation dips toward [Henault's] claims and outcrops at some distance beyond the claims. Because of this Wright [Henault's expert witness] testified that he believed that the formation extends beneath the Henault claims. The formation does not outcrop on the claims but a number of Tertiary dikes do.

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[1] The Multiple Surface Uses Act of 1955, 30 U.S.C. §§ 612-13, provides that the Government retains control of the vegetative surface resources in all mining claims located after 1955. Proceedings under the Act were commenced by Appellant Tysk as Montana State Director of the Bureau of Land Management to determine his right to manage the surface resources of Henault's mining claims. Since those claims antedated the Act by many years Tysk's proceedings entailed a challenge of the validity of the locations on which the claims were based. He asserted that those locations were invalid for lack of discovery of valuable minerals under 30 U.S.C. §§ 22, 23. A hearing examiner ruled that a valid discovery had been made. This decision was reversed by the Department's Office of Appeals and the reversal was upheld by the Secretary. 73 I.D. 184 (1966). This action was then commenced. Summary judgment was rendered in favor of Henault, the opinion the court appearing at 271 F.Supp. 474 (D.Mont. 1967). This appeal by the Government followed.

> These dikes are believed to originate below the Homestake formation and to penetrate that formation on their way to the surface. The slight mineral values found in the dikes by the extensive sampling are believed to represent leaks from the minerals in the Homestake formation. However, the really valuable mineral deposits are expected to be found at the intersections of the dikes with the Homestake formation and it is to establish this that Wright recommended the drilling of three holes to depths of 3500 to 4000 feet.
>
> There is no contention that the Homestake formation has actually been exposed on any of the Henault claims. There is also no contention that the Tertiary dikes or intrusions carry valuable mineral deposits. They are claimed merely to establish that the Homestake formation, which is believed to carry the valuable deposits, lies below the surface, possibly a few thousand feet down." *United States v. Henault Mining Co.*, 73 I. D. 184, 192-93 (1966).

Henault's expert on these facts recommended the expenditure of a substantial sum in core drilling to probe for minerals at depth.

Henault contends that this satisfies the "prudent man" test: that the discovered deposits are of such a character that "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine." *Castle v. Womble*, 19 L. D. 455, 457 (1894). [2] *See also* 1 American

[2] The prudent man test in a different context was discussed in two opinions handed down since the opinion of the District Court in the case before us. *United States v. Coleman*, 390 U.S. 599 (1968); *Converse v. Udall*, 399 F.2d 616 (9th Cir. 1968). In both cases the minerals constituting the asserted discovery had actually been exposed. The question was whether the mineral so discovered was valuable.

Law of Mining, ¶ 4.20 (1967).

We cannot agree. A reasonable prediction that valuable minerals exist at depth will not suffice as a "discovery" where the existence of these minerals has not been established. *East Tentic Consolidated Mining Claim*, 40 L. D. 271 (1911). [3]

No prudent man would proceed to the development of a mine on the surface showings we have here. He would drill to ascertain whether values exist at depth. If they do exist he would then proceed to development on the basis of that showing. All this Henault concedes.

The further exploration by drilling as recommended by Henault's expert is not then in the nature of development of a discovered lode. It is a search for values not yet discovered, the discovery of which would justify development.

Henault's "prudent man," then, is not a prudent mine developer but a prudent prospector. There would seem to be doubt, however, that the values so far discovered would justify even a prudent prospector in proceeding further. In its brief Henault points out that core drilling is estimated to entail a cost in excess of $150,000. Henault then inquires: "Can it be seriously believed that anyone is going to embark upon capital outlay of that magnitude without the assurance that its locations are supported by the 'discovery' which guarantee him that during and after such an undertaking the land will not be subject to other disposition?"

But the rules of discovery contemplate that it is that which has been discovered that will provide the incentive for

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[3] To the same effect: *Oregon Basin Oil & Gas Co.*, 50 L.D. 253 (1924); *United States v. Strauss*, 59 I.D. 129 (1945); *United States v. Miller*, 59 I.D. 446 (1947); *Monolith Portland Cement Co.*, 61 I.D. 43 (1952); see also: *United States v. Snyder*, 72 I.D. 223 (1965); *United States v. White*, 72 I.D. 522 (1965).

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development. Henault clearly is not satisfied. It wishes, as further incentive, what is tantamount to a guarantee of patentability – an assurance in advance that win or lose in its search for mineral values it will get its fee title. Public land cannot be dispensed on such a basis.

We note the reassurance of the Secretary that he is not attempting to oust Henault from its claims, but simply to gain control of the surface resources. (See footnote 1, supra). The opinion of the Secretary concludes:

> "[T]he determination here need not prevent further efforts by [Henault] to explore and develop the mineral deposits which may be found within the limits of its claims. [Henault] is free to undertake the drilling program recommended by Wright. As long as the land remains open to the operation of the mining laws, the claimant is protected in its right to such deposits as may be found, but until a patent is issued, its use of the land embraced by the claims is limited to mining and other uses of the land incidental to mining." 73 I. D. at 195-96.

Henault protests that by holding its discoveries invalid the Secretary has rendered void the locations which are the very foundation of its possessory rights. Henault is not without protection, however. In *Union Oil Co. v. Smith,* 249 U. S. 337, 346-47 (1919), it is stated:

> "For since, as a practical matter, exploration must precede the discovery of minerals, and some

> occupation of the land ordinarily is necessary for adequate and systematic exploration, legal recognition of the *pedis possessio* of a *bona fide* and qualified prospector is universally regarded as a necessity. It is held that upon the public domain a miner may hold the place in which he may be working against all others having no better right, and while he remains in possession, diligently working towards discovery, is entitled – at least for a reasonable time – to be protected against forcible, fraudulent, and clandestine intrusions upon his possession."

In *Converse v. Udall,* 399 F.2d 616, 620 (9th Cir. 1968), this court stated:

> "Here, the decision does not deprive Converse of his possession or of the right further to explore his claim and make a valid discovery."

The District Court is free to accomplish the same result here.

Summary judgment in favor of appellee is reversed. The matter is remanded for further proceedings consistent with the views here expressed.

BLEED THROUGH, POOR COPY

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HENAULT MINING COMPANY,
Plaintiff-Appellee,

vs. No. 22545

HAROLD TYSK, et al.,
Defendants-Appellants.

APPEAL from the United States District Court for the District of Montana.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

Filed and entered Nov. 14, 1969.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HENAULT MINING COMPANY, *Plaintiff - Appellee,* vs. HAROLD TYSK, individually and as Montana State Director of the Bureau of Land Management, and STEWART L. UDALL, individually and as Secretary of the Interior, *Defendant-Appellants.*	No. 22,545

[January 23, 1970]

On Petition for Rehearing

Before: BARNES and MERRILL, Circuit Judges, and TAYLOR, District Judge*

The panel as constituted in the above case has voted to modify the opinion in the respects hereinafter set forth, to deny the petition for rehearing and to reject the suggestion of a rehearing in banc.

*Honorable Fred M. Taylor, Chief United States District Judge for the District of Idaho, sitting by designation.

BLEED THROUGH POOR COPY

The full court has been advised of the suggestion for an in banc hearing and of the modification proposed by the panel and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed.R.App.P. 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

The opinion heretofore filed is modified in the following two respects:

1. The paragraph commencing line 3 of page 3 of the slip-sheet opinion is modified to read as follows:

> "We cannot agree. No vein or lode containing valuable mineral deposits has yet been discovered. The dikes that have been discovered through outcroppings simply constitute an indication that a vein or lode, yet unexposed, may exist at depth. A reasonable prediction that valuable minerals exist at depth will not suffice as a 'discovery' where the existence of these minerals has not been physically established. [3]"

2. Footnote 3 is modified to read as follows:

> "*Oregon Basin Oil & Gas Co.*, 50 L. D. 253 (1924); *United States v. Strauss*, 59 I. D. 129 ((1945); *United States v. Miller*, 59 I. D. 446 (1947); *Monolith Portland Cement Co.*, 61 I. D. 43 (1952); *United States v. Snyder*, 72 I. D. 223 (1965); *United States v. White*, 72 I. D. 522 (1965).

To the same effect is *East Tintic Consolidated Mining Claim*, 40 L. D. 271, 273 (1911), where it is stated:

> 'To constitute a valid discovery upon a claim for which patent is sought there must be actually and physically exposed within the limits thereof a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes.'

The decision was reversed in *East Tintic Consolidated Mining Co.*, 43 L.D. 79 (1914). The first opinion, however, is evidently regarded by the Department as good law on the proposition quoted. It has been cited and followed in *Austin v. Mann*, 56 I.D. 85 (1937); *United States v. Mouat*, 61 I.D. 289 (1954); *United States v. Pressentin & Devisees of the Martin Estate*, 71 I.D. 447 (1964). The reversal appears to have been on the question of how much of a vein is sufficient for discovery purposes. The first opinion held that 'small quartz veins, stringers or seams' were not enough. The second opinion held that they were; that it is not necessary for the discovery vein to 'contain mineral in commercial quantities.' As we have noted, however, in the case before us no vein has been discovered at all."

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Thursday, January 23rd, 1970.

Before BARNES and MERRILL, Circuit Judges, and TAYLOR, District Judge.

ORDER DENYING
PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellee filed December 11, 1969 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied, and rejecting suggestion for rehearing en banc.